4807

SUPREME COURT OF THE UNITED STATES.

No. 154.

THE PHILADELPHIA, WILMINGTON, AND BALTIMORE RAILROAD COMPANY, PLAINTIFF IN ERROR,
vs.
SEBRE HOWARD.

IN ERROR TO THE CIRCUIT COURT, UNITED STATES, FOR THE DISTRICT OF MARYLAND.

INDEX.

	Original.	Print.
Writ	1	4
Agreement	5	6
Declaration	6	7
Pleas	22	15
Issue	23	15
Agreement	24	15
Jury	24	16
Verdict	25	16
Judgment	25	16
Defendant's first bill of exceptions	26	17
Docket entries Cecil county court, October term, 1847	27	17
Defendant's second bill of exceptions	28	18
Paper marked A. (Sealed agreement)	28	19
Paper marked B. (Unsealed agreement)	35	21
Defendant's third bill of exceptions	40	24
Further evidence of R. C. Holliday	40	24
Defendant's fourth bill of exceptions	41	25
Evidence of Francis W. Ellis	41	25
Evidence of Henry Stump	42	25
Evidence of G. F. De la Roche	43	26
Cross examination	48	28
Examination in chief resumed	49	29
Articles of union	50	29
Copy of the injunction	57	33
Defendant's fifth bill of exceptions	60	34
Evidence of John Stump	60	34

GIDEON, Print.

	Original.	Print
Evidence of John J. Heckert	61	34
Evidence of R. P. Dowden	63	36
Cross examination of R. P. Dowden	65	37
Evidence of Francis Beatty	66	37
Estimate for September, 1836	67	38
Estimate for October, 1836	68	38
Estimate for November, 1836	69	39
Estimate for December, 1836	70	40
Estimate for January, 1837	71	41
Evidence of Farquhar, witness for defendant	72	42
Evidence of Wm. Slater, witness for defendant	74	43
Evidence of Windle, witness for defendant	75	43
Geo. F. De la Roche, further examined for plaintiffs	76	44
Cross examination	77	44
Evidence of J. Murray, witness for defendant	77	44
Evidence of B. H. Latrobe, witness for defendant	77	45
Evidence of J. Canby, witness for defendant	78	45
Defendant's sixth bill of exceptions	80	46
Further evidence of J. Canby	80	46
Letter from Stabler to Canby, presented 17th January, 1837	81	46
Contract forfeited	83	47
Resolution 6th February, 1837	84	48
Cross examination of James Canby	84	48
Evidence of D. Wilson, witness for defendant	85	49
Evidence of O. Scott, witness for defendant	85	49
Cross examination of O. Scott	86	49
Evidence of Low, witness for defendant	87	50
Letter from plaintiff to defendant	87	50
Notice to produce a paper	88	50
Cross examination of Low	89	50
Letter from Stabler to De la Roche, 23d October, 1836	89	51
Letter from same to same, 28th October, 1836	93	53
Letter from same to S. Howard, 2d November, 1836	95	54
Chancery record	96	54
Bill of complaint	97	55
Exhibit B, referred to in the bill	109	60
Answer	115	63
Petition for hearing motion	122	66
Affidavit of J. P. Stabler	125	68
Injunction	127	69
Agreement	129	70
Exceptions to the answer	130	70
Order to continue the injunction	135	73
Order to enter appeal	135	73
Decree of the court of appeals	136	73
Inquisition	138	75
Evidence of James Canby, witness for defendant	145	78
Record of Cecil county court	146	79

	Original.	Print.
Nar.	149	80
Commission to Ohio	171	91
Deposition of R. P. Dowden	187	99
Cross examination	197	104
Agreement	204	108
Amended nar.	205	109
Second commission to Ohio	210	111
Deposition of John McMurray	221	116
Cross examination	230	121
Commission to Wilmington	235	123
Plaintiff's objections to interrogatories	239	125
Deposition of Wm. P. Brobson	241	126
Amended nar.	251	131
Rule plea	294	150
Pleas	294	150
Ruled replication	309	156
Replication and issue to the first and second pleas	310	157
Demurrer to the 3d, 4th, 5th, 6th, 7th, 8th, and 9th pleas	310	157
Joinder in demurrer	311	157
Judgment on demurrers for the defendant	312	158
Defendant's seventh bill of exceptions	314	159
Plaintiff's prayers	315	159
Defendant's prayers	318	161
Court's instructions	325	163
Writ of error	333	166
Writ of error bond	335	166
Citation	339	168
Agreement of parties	340	168
Clerk's certificate	340	168

THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

At a circuit court of the United States, for the fourth circuit, in and for the Maryland district, begun and held at the city of Baltimore, on the first Monday in November, in the year of our Lord one thousand eight hundred and fifty.

Present, the honorable Roger B. Taney, chief justice of the Supreme Court of the United States; U. S. Heath, judge of Maryland district; Z. Collins Lee, esquire, attorney; Thomas H. Kent, (of Jos.,) esquire, marshal; Thomas Spicer, clerk.

Among other were the following proceedings, to wit:

SEBRE HOWARD
vs.
THE PHILADELPHIA, Wilmington, and Baltimore Railroad Company.

Be it remembered that heretofore, to wit, on the tenth day of December, in the year of our Lord one thousand eight hundred and forty-seven, the said Sebre Howard, by John Glenn, his attorney, prosecuted and sued forth out of the circuit court here the writ of the said United States of America, of capias ad respondendum, directed to the marshal of the Maryland district, in the words and of the tenor following, to wit:

Writ.

THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

[SEAL.] To the Marshal for the Maryland district, greeting:

We command you that you summon the Philadelphia, Wilmington, and Baltimore Railroad Company, a corporation chartered by the State of Maryland, whose stockholders are citizens of the State of Maryland, that they be and appear before the circuit court of the United States, for the fourth circuit, in and for the Maryland district, to be held at the city of Baltimore, on the first Monday in April next, to answer unto Sebre Howard, a citizen of the State of Illinois, in a plea that they keep with him the covenant made by the said Philadelphia, Wilmington, and Baltimore Railroad Company, with the said Sebre Howard, according to the force, form, and effect of a certain agreement made between them.

Hereof you are not to fail at your peril, and have you then and there this writ. Witness the honorable Roger B. Taney, chief justice of our supreme court, the first Monday in December, in the year of our Lord one thousand eight hundred and forty-seven.

J. G. Issued 10th Dec., 1847.

THO. SPICER,
Clerk circuit ct.

At which mentioned first Monday in April, in the year of our Lord one thousand eight hundred and forty-eight, being the day of the return of the aforegoing writ, comes into the circuit court here the said Sebre Howard, by his attorney aforesaid; and the marshal of the Maryland district aforesaid, to wit, Moreau Forrest, gentleman, to whom the said aforegoing writ was in form aforesaid directed, makes return thereof to the court here thus endorsed, to wit:

"Served on Mr. Cohen, the president.

MOREAU FORREST,
U. S. Marshal."

And the said Philadelphia, Wilmington, and Baltimore Railroad Company being called, appears in court here, by William Schley, its attorney. Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is continued until the first Monday in November next.

At which said first Monday in November, in the year of our Lord one thousand eight hundred and forty-eight, comes again into the circuit court here as well the said Sebre Howard, by John Glenn and Henry Stump, his attorneys, as the said Philadelphia, Wilmington, and Baltimore Railroad Company, by its attorney aforesaid.

Therefore further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is further continued until the first Monday in April next.

At which said first Monday in April, in the year of our Lord one thousand eight hundred and forty-nine, comes again into the circuit court here, as well the said Sebre Howard, by John Glenn, Henry Stump, his attorneys, as the said Philadelphia, Wilmington, and Baltimore Railroad Company, by its attorney aforesaid.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is further continued until the first Monday in November next.

At which said first Monday in November, in the year of our Lord one thousand eight hundred and forty-nine, comes again into the circuit court here, as well the said Sebre Howard, by his attorneys aforesaid, as the said Philadelphia, Wilmington, and Baltimore Railroad Company, by its attorney aforesaid.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is further continued until the first Monday in April next.

At which said first Monday in April, in the year of our Lord one thousand eight hundred and fifty, comes again into the court here, as well the said Sebre Howard, by John Glenn, Henry Stump, and John Nelson, his attorneys, as the said Philadelphia, Wilmington, and Baltimore Railroad Company, by William Schley and Otho Scott, its attorneys. Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, is, by order of the court here thereon, further continued until the first Monday in November next.

At which said first Monday in November, in the year of our Lord one thousand eight hundred and fifty, comes again into the circuit court here, as well the said Sebre Howard, by his attorneys aforesaid, as the said Philadelphia, Wilmington, and Baltimore Railroad Company, by its attorneys aforesaid.

And thereupon the parties aforesaid, by their attorneys aforesaid, file in the circuit court here an agreement in the words and figures following, to wit:

1st breach. In not paying the estimate of the first of January.

2d breach. Damages resulting from the injunction sued out by John Stump.

3d breach. For not building the bridge over Mill creek and the culvert in Cowden's woods, whereby the plaintiff was damaged by the necessity of making circuitous hauls.

4th breach. For omission seasonably to build the wharf and cribs on the Susquehanna, whereby the plaintiff was prevented from hauling the earth from the excavations made by him upon said road.

5th breach. For refusal to point out a place or places to permit plaintiff to waste or deposit the earth from the excavations of the road.

6th breach. For refusal to pay for the overhaul.

7th breach. For fraudulently declaring contract forfeited and thereby depriving plaintiff of gains which would otherwise have accrued to him on the completion of the contract, and refusal to pay the amount of the 15 per cent. retained by the defendant under the several estimates.

8th breach. For not paying said fifteen per cent. so retained upon the several estimates.

Agreement.

It is agreed that in lieu of pleadings in this case the plaintiffs shall file a declaration with one count, assigning formally the aforegoing breaches, and the defendant shall plead non est factum, with leave to give in evidence any matter of defence which will be specially pleaded.

J. GLENN, *for Plaintiff.*

W. SCHLEY, *for Defendant.*

And thereupon the said Sebre Howard, by his attorneys aforesaid, declared, against the said Philadelphia, Wilmington, and Baltimore Railroad Company, in the plea aforesaid, in form following, to wit.

Nar.

Circuit court of the United States, for the fourth circuit, in and for the Maryland district.

DISTRICT OF MARYLAND, *to wit:*

The Philadelphia, Wilmington, and Baltimore Railroad Company, whose stockholders are citizens of the State of Maryland, was summoned to answer unto Sebre Howard, who is a citizen of the State of Illinois, in a plea that it keep with him, the said Sebre Howard, the covenant made between the said Sebre Howard and the Wilmington and Susquehanna Railroad Company, according to the force, form, and effect of a certain agreement, made between the said Sebre Howard and the said Wilmington and Susquehanna Railroad Company, and according to the force, form, and effect of a certain act of the general assembly of Maryland, passed January the 20th, 1838, entitled "an act to authorize the union of the Baltimore and Port Deposit Railroad Company, the Wilmington and Susquehanna Railroad Company, and the Philadelphia, Wilmington, and Baltimore Railroad Company, being chapter number thirty of the laws made and passed by the general assembly of the State of Maryland, at a session thereof begun and held at Annapolis, on Monday, the twenty-fifth day of December, in the year one thousand eight hundred and thirty-seven.

Whereupon, the said Sebre Howard, the plaintiff, who is a citizen of the State of Illinois, by H. Stump, his attorney, complains, for that whereas the said Wilmington and Susquehanna Railroad Company, a corporation duly chartered by the State of Maryland, on the twelfth day of July, eighteen hundred and thirty-six, at Wilmington, that is to say, at the district aforesaid, made and entered into a certain agreement in writing with the said Sebre Howard, the plaintiff, sealed with the corporate seal of the said Wilmington and Susquehanna Railroad Company, and with the seal of the said Sebre Howard, the plaintiff, which agreement being in possession of the defendant, the plaintiff cannot produce into court here, the date whereof is the day and year aforesaid, and is of the tenor following, to wit:

"Agreement between Sebre Howard and Hiram Howard of the first part, and the Wilmington and Susquehanna Railroad Company of the second part.

The party of the first part, in consideration of the matters hereinafter referred to and set out, covenant and agree, to and with the party of the second part, to furnish and deliver at the proper cost of the said party of the first part, the building materials which are described in the annexed schedule to the said party of the second part, together with the necessary workmanship and labor on said railroad, and at such times, and in such quantities, as the party of the second part shall require and

designate; and faithfully, diligently, and in a good and workmanlike manner, to do, execute, and perform the office, work, and labor in the said schedule mentioned; and the party of the second part, in consideration of the premises, covenants, and agrees to pay the party of the first part, the sums and prices in the schedule mentioned, on or before the 1st day of November next, or at such other times, and in such manner, as are therein declared.

Provided, however, that in case the party of the second part shall at any time be of opinion that this contract is not duly complied with by the said party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular or negligent, then, and in such case, he shall be authorized to declare this contract forfeited, and thereupon the same shall become null, and the party of the first part shall have no appeal from the opinion and decision aforesaid, and he hereby release all right to except to or question the same in any place or under any circumstances whatever; but the party of the first part shall still remain liable to the party of the second part for the damages occasioned by the said non compliance, irregularity, or negligence.

And provided, also, that in order to secure the faithful and punctual performance, of the covenants above made by the party of the first part, and to indemnify and protect the party of the second part from loss in case of default and forfeiture of this contract, the said party of the second part shall, notwithstanding the provision in the annexed schedule, be authorized to retain in their hands, until the completion of the contract, fifteen per cent. of the money at any time due to the said party of the first part; thus covenanted and agreed by the said parties, this twelfth day of July 1836, as witness their seals.

SEBRE HOWARD, [SEAL.]
JAMES CANBY, *President.* [SEAL.]

Sealed and delivered in presence of—the date above changed to 1st November, and in the schedule the prices changed to 26 cents, and an extra price for extra haul inserted, and the work fixed to be done by November 1836, before signing.

W. P. BROBSON.

Schedule referred to.

The above named Sebre Howard and Hiram Howard contract to do all the grading of that part of section No. 9 in the State of Maryland, of the Wilmington and Susquehanna Railroad, which extends from station No. 191 to the end of the piers in the river Susquehanna, opposite Havre-de-Grace, according to the directions of the engineer, and according to the specification hereunto annexed, for the sum of twenty-six cents per cubic yard for every cubic yard excavated, the said section to be completed in a workmanlike manner, viz., one mile from station No. 191 by October 15th, 1836, and the residue by November 1st, ensuing.

They also contract to make the embankment at the river from the excavation of the road, provided the haul shall not exceed a distance of eight hundred feet from the eastern termination of the said embankment; all other portions of the hauling together not to exceed an average of eight hundred feet, and for any distance exceeding the said average the price to be one and a half cents per cubic yard for each hundred feet haul. The party of the second part contracts to pay to the said Sebre and Hiram Howard the said sum of twenty-six cents per cubic yard, in monthly payments, according to the measurement and valuation of the engineer, retaining from each payment fifteen per cent. until the final completion of the work. If any additional work, in consequence of water, grubbing, or hard material, is required on the side ditch or ditches through Cowden's woods, the same is to be decided by the engineer as in case of rock, &c.

Specification of the manner of grading the Wilmington and Susquehanna railroad.

Before commencing any excavation or embankment, the natural soil must be removed to the depth of three inches from the whole surface occupied by the same, for the purpose of afterwards sodding the slopes thereof, and all stumps, trees, bushes, &c., entirely removed from the line of the road, as directed by the engineer. In case of embankment, a grip must be cut, about one foot deep, for footing the slopes and preventing them from slipping. The embankments must be very carefully carried up in layers of about one foot in thickness, laid in hollow form; and in sodding, all hauling or wheeling, whether loaded or empty, must be done over the same.

The slopes of the excavations and embankments will be one and a half horizontal to one perpendicular, except when otherwise ordered by the engineer, and are to be sodded with the sods removed from the original surface. Side ditches and back drains must be cut wherever ordered by the engineer, at the same price as the common excavation; the side ditches will, on an average, be about nine feet wide at top and about two feet deep, and will extend along a great portion of the road. In most places where embankments are to be made, the cutting of the adjacent parts is about sufficient for their formation; and, as the contractor is supposed to have examined the ground and profiles, and to have formed his estimates accordingly, no allowance will be made for extra hauling; where more earth is required than is procured from the excavations, the contractor shall take it from such places as the engineer may direct, the cost, per cubic yard, being the same as the other parts; where there is any earth from the excavation more than is required for the embankment, it shall be placed where ordered by the engineer; all the estimates will be made by measuring the excavations only; loose rock, boulders, iron, stone, or other pebbles of a less weight than one-fourth of a ton, are to be removed by the contractor at the same price as the common excavation, but in cases of large size, or for blasting, the price shall be a matter of specific agreement between the contractor

cond part in the premises as aforesaid, he did, with great diligence and care, and with all proper and necessary means, and without any unnecessary or unavoidable delay, proceed with and continue to execute the work in said agreement specified, according to the terms and conditions thereof, in a faithful and workmanlike manner, and did observe, fulfil, and keep all the terms and conditions of said agreement on his part to be observed, fulfilled, and kept, except so far only as he was prevented from finishing the work specified in the agreement by the injunction aforesaid, the omission of the party of the second part to construct the culverts and bridges on the line of the said road as aforesaid, and the orders, interference, and hindrance of the said party of the second part; and that after the said 15th of October and the said 1st of November, the times fixed for the completion of said road in said agreement, he did proceed, under the orders of the engineer aforesaid, and at the request, and by the permission of the said party of the second part, and by the authority and in pursuance and virtue of the agreement mentioned, according to the terms and conditions thereof, and performed and fulfilled every thing on his part by said agreement to be done and performed, from the time of making the said agreement until the 18th day of January, 1837, (from and after which time he was prevented from further executing said work by the act of the party of the second part, though ready and willing to perform the same.)

And the said plaintiff avers, that the engineer of the party of the second part estimated the work of said plaintiff, done under said agreement in and during the month of December, 1836, according to measurement and valuation, at a large sum of money, to wit, the sum of three thousand one hundred and forty-seven dollars and eighteen cents, which, on the first day of January, 1837, was justly due the plaintiff for his said work so by him done, and which remains due and unpaid, except one thousand dollars, part thereof; which said sum was so estimated to be due to said plaintiff, deducting the fifteen per cent. in said agreement specified to be retained by the said party of the second part, until the final completion of said work; yet the said plaintiff in fact says, that the said party of the second part, although often requested so to do, to wit, at the district aforesaid, did not and would not pay to the said plaintiff the said sum of three thousand one hundred and forty-seven dollars and eighteen cents, or any part thereof, and so has not, except as before stated in this regard, kept its said covenant; (and the said plaintiff further in fact says, that said Hiram Howard never participated in or became party to said contract, by signing or sealing the same, nor did or performed any work thereunder.)

And the said plaintiff in fact further says, that the engineer of the party of the second part to said agreement, the defendant in this action, afterwards, to wit, on the first day of February, eighteen hundred and thirty-seven, at Wilmington, to wit, at the district aforesaid, estimated the work done and performed by the said plaintiff under said agreement, in and during the month of January, eighteen hundred and thirty-seven, according to measurement and valuation, at a large sum of

money, to wit, the sum of two hundred and eighty-two dollars and fifty-five cents, which was then and there justly due to said plaintiff for said work so by him done under said contract, during the said month of January, and at other times, for which no other estimate had been made, and which was so due after deducting the fifteen per cent. in said agreement specified to be retained by the said defendant until the final completion of said work.

And the said plaintiff avers, that said sum of money remains due and unpaid, and that said defendant has never paid the same, although requested to do so, to wit, at the district aforesaid; and so in this behalf hath not kept its said covenant and agreement.

And the said plaintiff further in fact says, that by reason of the non-obtention of any right or title of said defendant in and over the whole of said section No. 9, so contracted to be excavated and graded by said plaintiff as in said agreement stipulated, and by reason of the injunction aforesaid the said plaintiff was, for a long time, by the neglect and default of said defendant, hindered and delayed in the prosecution of his work on said section in a due and reasonable time, and at a proper season of the year, to wit, in the months of September and October, 1836, whereby said plaintiff incurred divers heavy losses, and was forced to lay out a large sum of money in performing such contract—larger than would have been necessary if no such impediment had occurred, to wit, the sum of ten thousand dollars—which said defendant has refused to allow and pay to the said plaintiff, although thereto afterwards requested, to wit, at the district aforesaid.

And the said plaintiff further in fact says, that in the performance of the said work under said contract, the said plaintiff hauled a large body of earth, to wit, one hundred thousand cubic yards, an average distance of two thousand feet over and above eight hundred feet, for which he, the said plaintiff, was entitled to receive a large sum of money, to wit, the sum of thirty thousand dollars; which sum of money, or any part thereof, the said defendants have refused to pay to said plaintiff, altho' by him applied to for the payment thereof, to wit, at the district aforesaid.

And the said plaintiff further in fact says, that although he, the said plaintiff, faithfully progressed in the performance of his contract and in building the embankment upon and near to, and filling up the wharf at, the river Susquehanna; and although the said defendant was bound to provide suitable cribs and fixtures to enable said plaintiff to proceed with, and execute, and perform said work; yet the said defendant neglected and refused to provide the same, whereby the said plaintiff was delayed and hindered in the performance of his said work and labor, and was obliged to lay out and expend a large sum of money over and above any sum which would have been necessary and proper if said defendant had furnished and provided, as they were by said contract bound to do, the said cribs and fixtures, to wit, the sum of fifteen thousand dollars, and which sum said defendant, though requested, have refused to pay to said plaintiff.

And the said plaintiff further in fact says, that in the progress of his said work under said contract, a larger quantity of earth, to wit, fifty thousand cubic yards, was taken and to be taken from the excavation on said section 9 by the said plaintiff, more than was required for the embankments on said section, which the defendant aforesaid agreed should be placed in some situation to be ordered by the engineer of said defendant; yet the said plaintiff avers that said defendant refused to permit its said engineer to name or furnish any situation to place the same, and the said engineer also refused to order the same to be placed in any place whatever; whereby the said plaintiff was wholly prevented from completing his said work, or prosecuting the same, and whereby he, the said plaintiff, incurred great damage and loss, to wit, the loss of ten thousand dollars, to wit, at the district aforesaid.

And the said plaintiff further in fact says, that he, the said plaintiff, faithfully performed the work and labor required to be performed by him on said work, and that the engineer of said defendant measured and valued the work and labor done by plaintiff for said defendant under said contract at a large sum, to wit, at the price of fifty thousand dollars, and that said defendant retained of said sum fifteen per centum thereof until said contract was finished.

And the plaintiff further avers, that although said contract has been finished, and the work on said contract completed, and no damage or loss has accrued to defendant by any default on the part of the plaintiff in the execution of said contract, yet the said defendant, although often requested, has not paid said money, or any part thereof, to the said plaintiff, but has refused so to do, to wit, at the district aforesaid.

And the said plaintiff further in fact says, that although said plaintiff well and faithfully performed a large portion of the work by him in said contract covenanted to be performed, and was diligently and faithfully engaged in performing the residue thereof, yet the said defendant, fraudulently and without reasonable or probable cause, on the 18th day of January, 1837, at Wilmington, to wit, at the district aforesaid, declared the said contract, so entered into between said plaintiff and said defendant, forfeited, and compelled and obliged the said plaintiff to abandon said work and labor under said contract, whereby the said party sustained great loss, to wit, to the value of thirty thousand dollars; and so the said plaintiff avers, that the said defendant, although often requested so to do, hath not kept its covenant so made by said defendant with the said plaintiff, in manner and form aforesaid, but hath broken the same, and to keep the same with the plaintiff hath wholly refused, and still refuses so to do, to wit, at the district aforesaid, to the damage of said plaintiff fifty thousand dollars, and therefore he brings his suit, &c.

HENRY STUMP, *for Plaintiff.*

And thereupon the said Philadelphia, Wilmington, and Baltimore Railroad Company, by William Schley, its attorney, files in the circuit court here the following pleas, to wit:

1846.

THE PHILADELPHIA, Wilmington, and Baltimore Railroad Company at suit of SEBRE HOWARD.

In the circuit court of the United States, for the fourth circuit, in and for the district of Maryland.

Pleas.

And the said defendant, by William Schley, its attorney, comes and defends the wrong and injury, when, &c., and says, that the said supposed agreement in writing, in the said declaration mentioned, is not the deed of this defendant. And of this the said defendant puts itself upon the country, &c.

And the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, for a further plea in this behalf says, that the said supposed agreement in writing, in the said declaration mentioned, is not the deed of the Wilmington and Susquehanna Railroad Company in the said declaration mentioned. And of this the said defendant puts itself upon the country, &c.

And the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, for a further plea in this behalf to the said declaration says, that the said Wilmington and Susquehanna Railroad Company, in the said declaration mentioned, did not make, or enter into, an agreement in writing with the said plaintiff, sealed with the corporate seal of the said Wilmington and Susquehanna Railroad Company, in manner and form as the said plaintiff hath above in his said pleading alleged. And of this the said defendant puts itself upon the country, &c.

WILLIAM SCHLEY,
Attorney for Defendant.

Issue.

And the said Sebre Howard, in like manner, &c.

It is agreed, that the above pleas are filed, with leave to give in evidence any matter of defence which could be specially pleaded by the defendant.

HENRY STUMP,
J. NELSON,
J. GLENN,
By J. NELSON,
For Plaintiff.
WM. SCHLEY,
For Defendant.

Therefore let a jury thereon appear before the court here immediately, by whom, &c., and who neither, &c., to recognise, &c., be-

cause as well, &c.; whereupon, for trying the issues aforesaid, it is ordered by the court here, that twenty persons from the pannel of petit jurors returned to the court here by the marshal of the Maryland district aforesaid, be drawn by ballot, according to the statute in such case made and provided; and thereupon the twenty persons being so drawn by ballot, and written upon two lists, one of which said lists is delivered to the counsel for the respective parties, and the counsel for each of the said parties having stricken out four persons from the said lists, thereupon the remaining twelve persons being called, come, to wit:

Jury.

Samuel Parker, George W. Duvall, Henry W. Talbott, Samuel Jackson, John J. Smith, Nicholas S. Hutchins, William Taylor, Joshua F. Cockey, Richard Sheckels, Quinton W. Ratcliffe, Samuel C. Viers, and John Showacre, who being empannelled and sworn to say the truth in the premises, upon their oath do say:

Verdict.

That the said Philadelphia, Wilmington, and Baltimore Railroad Company hath not observed, performed, fulfilled, or kept any of the covenants, grants, articles, clauses, contracts, conditions, and agreements in the within written articles of agreement contained and specified, on the part of the said Philadelphia, Wilmington, and Baltimore Railroad Company, to be observed, performed, fulfilled, and kept, according to the form and effect of the said articles of agreement within written, as the said Sebre Howard within complains against it; and they assess the damages of the said Sebre Howard, by reason of the breaches of the covenants aforesaid, to the sum of twenty-four thousand four hundred and twenty-five dollars and twenty-four cents, current money.

Judgment.

Therefore, it is considered by the court here, that the said Sebre Howard recover against the said Philadelphia, Wilmington, and Baltimore Railroad Company, as well the sum of twenty-four thousand four hundred and twenty-five dollars and twenty-four cents, current money, by the jury aforesaid in form aforesaid assessed, for his damages which he hath sustained by reason of the breaches of the covenants aforesaid, as the sum of by the court here adjudged unto the said Sebre Howard, for his costs and charges by him about his suit in this behalf laid out and expended; and the said Philadelphia, Wilmington, and Baltimore Railroad Company, in mercy, &c.

Memorandum.—Before the jurors aforesaid withdrew from the bar of the court here, the said Philadelphia, Wilmington, and Baltimore Railroad Company, by its attorneys aforesaid, tended to the court here the following bills of exception, and which were by the court here signed and sealed, and which are in form following, to wit:

First bill of exceptions.—Defendant's first bill of exceptions.

SEBRE HOWARD
vs.
THE PHILADELPHIA, Wilmington, and Baltimore Railroad Company.

In the circuit court of the United States, in and for the fourth circuit and district of Maryland.

At the trial of this cause the plaintiff, to maintain the issue on his part joined, proved by Richard T. Holliday, a competent witness, that he is the present clerk of Cecil county court, and that the following is a true copy of the docket entries under the seal of Cecil county court in a case heretofore depending in that court.

In Cecil county court, October term, 1847.

S. & H. HOWARD, use of Charles Howard, use of Hinson H. Cole, $5,000, use of Daniel B. Banks, $1,000,
vs.
THE WILMINGTON and Susquehanna Railroad Company.

Procedendo and record from the court of appeals; leave to amend pleadings; nar. filed; pleas filed; similiter; replication and demurrer; leave to defendant to amend pleadings; amended pleas; replication and demurrer; rejoinder; agreement; leave to defendants to issue commission to Wilmington, Delaware; agreement filed; jury sworn; jury find their verdict for the defendant, under instructions from the court, without leaving their box; December 3d, 1847, judgment on the verdict.

In testimony that the above is a true copy of the docket entries taken from the record of Cecil county court, for October term, 1847, [SEAL.] I hereunto set my hand, and the seal of said court affix, this 12th day of November, A. D. 1849.

R. C. HOLLYDAY,
Clerk of Cecil county court.

The plaintiff then offered to read said docket entries in evidence to the jury, for the purpose of shewing that such a suit was depending in said court, as shewn by said docket entries, and for no other purpose; but the defendant, by its counsel, objected to said docket entries as legal and competent evidence in this cause, and insisted that the same ought not to be read to the jury as evidence in this cause, for the purpose for which they were offered, or for any other purpose. But the court overruled the said objection, and permitted the said docket entries to be read in evidence in this cause, and the same were accordingly read to the jury. To the admission of which said docket entries in evidence the defendant, by its counsel, prayed leave to except, and

prayed that the court would sign and seal this the defendant's first bill of exceptions, according to the form of the statute in such case made and provided, and which is accordingly done, this 8th day of November, in the year of our Lord 1850.

R. B. TANEY, [SEAL.]
U. S. HEATH. [SEAL.]

Second bill of exceptions.—Defendant's second bill of exceptions.

SEBRE HOWARD
vs.
THE PHILADELPHIA, Wilmington, and Baltimore Railroad Company.

The plaintiff then further proved, by said Richard T. Hollyday, that he was present in the month of December, 1847, at the trial in Cecil county court of the said cause, specified in the said docket entries referred to in the first bill of exceptions, and being shewn the paper marked A, of which the following is a true copy.

Agreement between Sebre Howard and Hiram Howard, of the first part, and the Wilmington and Susquehanna Railroad Company, of the second part.

The party of the first part, in consideration of the matters hereinafter referred to and set out, covenants and agrees, to and with the party of the second part, to furnish and deliver, at the proper cost of the said party of the first part, the building materials which are described in the annexed schedule, to the said party of the second part, together with the necessary workmanship and labor on said railroad, and at such times, and in such quantities, as the party of the second part shall require and designate; and faithfully, diligently, and in a good and workmanlike manner, to do, execute and perform the office, work, and labor in the said schedule mentioned.

And the party of the second part, in consideration of the premises, covenants and agrees to pay the party of the first part the sums and prices in the said schedule mentioned, on or before the first day of November next, or at such other times and in such manner as are therein declared.

Provided, however, that in case the party of the second part shall at any time be of opinion that this contract is not duly complied with by the said party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular, or negligent; then, and in such case, he shall be authorized to declare this contract forfeited, and thereupon the same shall become null; and the party of the first part shall have no appeal from the opinion and decision aforesaid, and he hereby releases all right to except to, or question the same, in any place or under any circumstances whatever; but the party of the first part shall still remain liable to the party of the second part, for the damages occasioned to him by the said non-compliance, irregularity, or negligence.

And provided, also, that in order to secure the faithful and punctual performance of the covenants above made by the party of the first part, and to indemnify and protect the party of the second part from loss in case of default and forfeiture of this contract, the said party of the second part shall, notwithstanding the provision in the annexed schedule, be authorized to retain in their hands, until the completion of the contract, fifteen per cent. of the moneys at any time due to the said party of the first part. Thus covenanted and agreed by the said parties, this twelfth day of July, 1836, as witness their seals.

SEBRE HOWARD, [SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]
JAMES CANBY, *Pres't.* [SEAL.]

Sealed and delivered in the presence of—
WM. P. BROBSON. [SEAL.]

Schedule referred to above.

The above named Sebre Howard and Hiram Howard contract to do all the grading of that part of section No. 9, in the State of Maryland, of the Wilmington and Susquehanna railroad, which extends from station No. 191, to the end of the piers and wharf in the river Susquehanna, opposite Havre de Grace, according to the directions of the engineer, and according to the specification hereto annexed, for the sum of twenty-six cents per cubic yard, for every cubic yard excavated; the said section to be completed in a workmanlike manner, viz., one mile from station No. 191, by October 15, 1836, and the residue by November 1, ensuing.

They also contract to make the embankment at the river from the excavation of the road, provided the haul shall not exceed a distance of eight hundred feet from the eastern termination of the said embankment; all other portions of the hauling together not to exceed an average of eight hundred feet; and for any distance exceeding the said average the price is to be one and a-half cents per cubic yard for each hundred feet.

The party of the second part contracts to pay to the said Sebre and Hiram Howard, the said sum of twenty-six cents per cubic yard in monthly payments, according to the measurement and valuation of the engineer, retaining from each payment fifteen per cent., until the final completion of the work. If any additional work, in consequence of water, grubbing, or hard material, is required on the side ditch or ditches, or through Cowden's woods, the same is to be decided by the engineer, as in case of rock, &c.

Specification of the manner of grading the Wilmington and Susquehanna railroad.

Before commencing any excavation or embankment, the natural sod must be removed to a depth of three inches from the whole surface occupied by the same, for the purpose of afterwards sodding the slopes thereof,

and all stumps, trees, bushes, &c., entirely removed from the line of road as directed by the engineer. In cases of embankment a grip must be cut about one foot deep for footing the slopes, and preventing them from slipping. The embankments must be very carefully carried up in layers of about one foot in thickness, laid in hollow form; and in so doing, all hauling or wheeling, whether loaded or empty, must be done over the same. The slopes of excavations and embankments will be one and a-half horizontal to one perpendicular, except where otherwise ordered by the engineer, and are to be sodded with the sods removed from the original surface.

Side ditches and back drains must be cut wherever ordered by the engineer, at the same price as the common excavation. The side ditches will on an average be about nine feet wide on top, and about two feet deep, and will extend along a great portion of the road. In most places where embankments are to be made, the cutting of the adjacent parts is about sufficient for their formation, and as the contractor is supposed to have examined the ground and profiles, and to have formed his estimates accordingly, no allowance will be made for extra hauling. Where more earth is required than is procured from the excavations, the contractor shall take it from such places as the engineer may direct, the cost per cubic yard being the same as the other parts. Where there is any earth from the excavations, more than is required for the embankments, it shall be placed where ordered by the engineer.

All the estimates will be made by measuring the excavations only.

Loose rock, boulders, iron stone, or other pebbles, of a less weight than one-fourth of a ton, are to be removed by the contractor at the same price as the common excavation; but in cases of larger size, or for blasting, the price shall be a matter of special agreement between the contractors and engineer, and if the former should not be willing to execute it for what appears to the engineer a fair price, the latter may put the same into other hands.

No extra allowance will be made for cutting down trees, grubbing, bailing, or other accidental expenses.

Measurements and estimates will be taken about once a month, and full payment will be made by the directors, after deducting 15 per cent., which deduction on each estimate will be retained until the entire contract is completed, which must be on or before the

It is distinctly understood by the contractors that the use of ardent spirits among the workmen is strictly forbidden.

WILLIAM STRICKLAND,
Chief Eng. of the Wil. & Sus. R. R.

(*Endorsed.*)—*S. and H. Howard's contract.*

A.

This is the paper marked A, referred to by Wm. P. Brobson, esq., in his answer to second interrogatory on the part of the defendant.

Before E. W. GILPIN,
THOMAS McDOWELL, *Commissioners.*

He was asked whether or not he had ever seen said paper before, and particularly whether or not he had seen the paper A, exhibited as a paper of defendant's, and in the possession of the counsel for the defendant in said case, specified in said docket entries at the said trial in December, 1847; but the defendant, by its counsel, objected to said question, and to the admission in evidence of any answer to the same, on the ground that that suit was between different parties; but the court overruled the objection to said question, and to the answer to the same, and permitted the said witness to answer the same, who deposed that the plaintiff in said case, at said trial in Cecil county court, relied upon another paper, shown to the witness marked B, and which is as follows:

Unsealed agreement.

Agreement between Sebree Howard and Hiram Howard, of the first part, and the Wilmington and Susquehanna Railroad Company, of the second part.

The party of the first part, in consideration of the matters hereinafter referred to and set out, covenants and agrees, to and with the party of the second part, to furnish and deliver, at the proper cost of the said party of the first part, the building materials which are described in the annexed schedule, to the said party of the second part, together with the necessary workmanship and labor on said railroad, and at such times, and in such quantities as the party of the second part shall require and designate; and faithfully, diligently, and in a good and workmanlike manner, to do, execute, and perform the office, work, and labor in the said schedule mentioned.

And the party of the second part, in consideration of the premises, covenants and agrees to pay the party to the first part the sums and prices in said schedule mentioned, on or before 1st day of November next, or at such other times and in such manner as therein declared.

Provided, however, that in case the party of the second part shall at any time be of opinion that this contract is not duly complied with by the said party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular or negligent, then, and in such case, he shall be authorized to declare this contract forfeited, and thereupon the same shall become null; and the party of the first part shall have no appeal from the opinion and decision aforesaid, and he hereby releases all right to except to or question the same in any place or under any circumstances whatever; but the party of the first part shall still remain liable to the party of the second part for the damages occasioned to him by the said non-compliance, irregularity, or negligence. And provided, also, that in order to secure the faithful and punctual performance of the covenants above made by the party of the first part, and to indemnify and protect the party of the second part from loss in case of default and forfeiture of this contract, the said party of the second part shall, notwithstanding the provision in the annexed schedule, be authorized to retain in their hands, until the com-

pletion of the contract, fifteen per cent. of the money at any time due to the said party of the first part. Thus covenanted and agreed by the said parties, this twelfth day of July, 1836, as witness their seals.

SEBRE HOWARD, [SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]
JAMES CANBY, *Pres.* [SEAL.]

Sealed and delivered in the presence of—

The date above changed to "1st of November," and in the schedule the price changed to "26 cents," and an extra price for extra haul inserted, and the work fixed to be done by November 1, 1836, before signing.

WM. P. BROBSON.

Schedule referred to above.

The above named Sebre Howard and Hiram Howard, contract to do all the grading of that part of section No. 9, in the State of Maryland, of the Wilmington and Susquehanna railroad, which extends from station No. 191 to the end of the piers and wharf in the river Susquehanna opposite Havre de Grace, according to the directions of the engineer, and according to the specification hereto annexed, for the sum of twenty-six cents per cubic yard for every cubic yard excavated; the said section to be completed in a workmanlike manner, *by the* viz., one mile from station 191, by October 15, 1836, and the residue by November 1st ensuing. They also contract to make the embankment at the river from the excavation of the road, provided the haul shall not exceed a distance of eight hundred feet from the eastern termination of the said embankment; all other portions of the hauling together not to exceed an average of eight hundred feet, and for any distance exceeding the said average, the price is to be one and a half cents per cubic yard for each hundred feet.

The party of the second part contracts to pay to the said Sebre and Hiram Howard the said sum of twenty-six cents per cubic yard, in monthly payments, according to the measurement and valuation of the engineer, retaining from each payment fifteen per cent., until the final completion of the work.

If any additional work, in consequence of water, grubbing, or hard material, is required on the side ditch or ditches through Cowden's woods, the sum is to be decided by the engineer, as in case of rock, &c.

Specification of the manner of grading the Wilmington and Susquehanna railroad.

Before commencing any excavation or embankment, the natural sod must be removed to a depth of three inches from the whole surface occupied by the same, for the purpose of afterwards sodding the slopes thereof; and all stumps, trees, bushes, &c., entirely removed from the line of the road, as directed by the engineer. In cases of embankment, a grip must be cut about one foot deep for footing the slopes, and preventing them from slipping.

The embankments must be carefully carried up in layers of about one foot in thickness, laid in a hollow form; and, in so doing, all hauling or wheeling, whether loaded or empty, must be done over the same.

The slopes of the excavations and embankments will be ½ horizontal to one perpendicular, except where otherwise ordered by the engineer, and are to be sodded with the sods removed from the original surface.

Side ditches and back drains must be cut wherever ordered by the engineer, at the same price as the common excavation. The side ditches will, on an average, be about 9 feet wide on top, and about 2 feet deep, and will extend along a great portion of the road.

In most places where embankments are to be made, the cutting of the adjacent parts is about sufficient for their formation, and as the contractor is supposed to have examined the ground and profiles, and to have formed his estimates accordingly, no allowance will be made for extra hauling. Where more earth is required than is procured from the excavations, the contractor shall take it from such places as the engineer may direct, the cost per cubic yard being the same as the other parts. Where there is any earth from the excavations more than is required for the embankments, it shall be placed where ordered by the engineer.

All the estimates will be made by measuring the excavations only.

Loose rock, boulders, iron stone, or other pebbles of a less weight than one fourth of a ton, are to be removed by the contractor at the same price as the common excavation; but in cases of a larger size, or for blasting, the price shall be a matter of special agreement between the contractor and engineer, and if the former shall not be willing to execute it for what appears to the engineer a fair price, the latter may put the same into other hands.

No extra allowance will be made for cutting down trees, grubbing, bailing, or other accidental expenses.

Measurements and estimates will be taken about once a month, and full payment will be made by the directors, after deducting fifteen per cent., which deduction on each estimate will be retained until the entire contract is completed, which must be on or before the

It is to be distinctly understood by the contractors, that the use of ardent spirits among the workmen is strictly forbidden.

WILLIAM STRICKLAND,
Chief engineer of the Wil. & Sus. R. R.

(Endorsed.)

S. & H. Howard's contract for section No. 9.

(B.)

Filed as part of the 1st cross interrogatory by plaintiff to W. P. Brobson, a witness on behalf of defendant, in suit by Howards vs. Philadelphia, Wilmington, and Baltimore Railroad Company, in Cecil county court.

This is the paper, marked B, referred to by William P. Brobson, esquire, in his examination in answer to the 1st cross interrogatory.

E. W. GILPIN,
THOMAS McDOWELL,
Commissioners.

But that one of the counsel for the defendant had then and there in his possession, at said trial, the said paper, marked A, and handed the said paper to Judge Chambers as the real contract in the case, and spoke of it as the real and genuine contract between the parties.

To which said question to said witness, and to the answer given by the said witness thereto, the defendant by its counsel prayed leave to except, and prayed that the court would sign and seal this its second bill of exceptions, which is accordingly done, this 8th day of November, 1850.

R. B. TANEY, [SEAL.]
U. S. HEATH. [SEAL.]

Defendant's third bill of exceptions.—Defendant's third bill of exceptions.

SEBRE HOWARD
vs.
THE PHILADELPHIA, WILMINGTON, and Baltimore Railroad Company.

The said Richard T. Hollyday being further examined, stated that whether the impression on said paper, marked A, is or is not the seal of the Wilmington and Susquehanna Railroad Company, he does not know, not having seen at any time the seal of the said company, but that the witness thinks that said paper A was offered in evidence by the defendant in said cause in Cecil county court, as the deed of said company, and that evidence of that fact that it was such deed was offered by said defendant. The plaintiff then offered to read in evidence to the jury the said paper marked A, but the defendant, by its counsel, objected to the admissibility of said paper in evidence to the jury. But the court overruled the said objection, and permitted the said paper to be read in evidence to the jury, as prima facie proved to be the deed of the said Wilmington and Susquehanna Railroad Company; to the admission of which said paper in evidence, the said defendant, by its

counsel, objected, and prayed that the court would sign and seal this its third bill of exceptions, and which is accordingly done, this 8th day of November, 1850.

R. B. TANEY, [SEAL.]
U. S. HEATH. [SEAL.]

Defendant's 4th bill of exceptions.—Defendant's fourth bill of exceptions.

SEBRE HOWARD
vs.
THE PHILADELPHIA, Wilmington, and Baltimore Railroad Company.

Evidence of F. W. Ellis.

The plaintiff then further proved by Francis W. Ellis, a competent witness, that he is a member of the bar of Cecil county court, and that he was present at said court, in December, 1847, at the trial of said case, specified in said docket entries set out in the first bill of exceptions; that at said trial no evidence, whatever, was given by the defendant; but that, at the conclusion of the plaintiff's case, an objection was made by the counsel for the defendant in the case, to the plaintiff's right of recovery, and he thinks the ground of objection was that the action should not have been brought in the names of Sebre Howard and Hiram Howard. The said witness further stated that, at said trial, one of the counsel for the defendant in that case, had in his hands the paper marked A, offered in evidence in this case by the plaintiff, and that he stated, not only to those around him at the bar, but also in conversation with the presiding judge, that said paper was the real contract between the parties.

Evidence of Henry Stump.

The plaintiff further proved by Henry Stump, a competent witness, that he was present at the trial, in December, 1847, in Cecil county court of the said case, specified in the said docket entries, set out in the first bill of exceptions, and that he was so present as one of the counsel for said plaintiff, and that he took part in the trial. That at said trial the said paper, marked A, was offered in evidence by the defendant, and relied on by the counsel for the defendant in that case, the same having been proved by a witness to be sealed with the corporate seal of said defendant; and that the objection to the right of recovery in that case was based on said paper, marked A, as a deed; and that the production and proof of said paper A, as the sealed deed of the defendant at once satisfied him that said suit could not be maintained, and that he, therefore, suffered the verdict to be taken for the defendant.

Evidence of G. F. De la Roche.

The plaintiff also proved by George F. De la Roche, a competent witness, that from some time in September, 1836, until the 18th day of January, 1837, he was in the service of the defendant, as principal assistant engineer, and that section No. 9 of said railroad was within the part of the said road under his charge. That at the time he went upon the road the plaintiff was engaged in the execution of the work on said section, and had a considerable force of men and carts; that he is unable to say, at the time, the exact force then the plaintiff really had, but he is certain it was satisfactory to him as engineer. The said witness further stated that, whilst he was so acting as engineer, an injunction from chancery issued on the bill of John Stump was, for a portion of the time, in force; and that plaintiff was prohibited by said injunction, from the time it was served until it was suspended, from working on the western limits of his work, near the Susquehanna river. The said witness further stated, that the said plaintiff had two sets of hands on the said section; one set, who were Irish, had their shanties towards the eastern part of the work; and the other set, being the greater number, who were Germans, had their shanties near the river, on the western part of the work. And said witness stated that after said injunction was issued, and the plaintiff was thereby prohibited from working on the western portion of his section, he was compelled to send his men and carts, whose shanties were on the western part of the work, near the river, over to the eastern part, and that in doing this much time was lost in going to work and back to meals, and that both men and horses were greatly worried, and were rendered less efficient in doing work. The difference in distance was upwards of a mile; and the loss was two hours per day. That said witness exhibited a profile, and proved that the same was a true and correct profile of the original plan of the work, and of the plan as altered by the said company, after the work had been some time in progress. [Here insert it.] The said witness says that the lines colored and marked by the figures shew the original grade of the road as originally designated to be made. In the month of October, 1836, the grade of the said road was altered, and the line marked shews the altered grade of the road. When the road was first laid out, the width was marked out by stakes; but when the grade of the road was altered, by reason of its being considerably sunk from station 256 to the river, the width of the road at the top was greatly enlarged. In consequence of this alteration in the grade of the road, and the consequent increase of its width, a great deal more work was necessary than would have been necessary according to the original plan of the work.

The said witness further stated there was no alteration in the plan of the work as respected the first mile of the section from station No. 191 to station 245. The alteration was in the part of the road from station 256 westwardly to the river. The excavation at the eastern end was of easy accomplishment, being merely cutting through a hill; but the material to be excavated at the westward was tough clay.

The said witness further stated, that the culverts in Stump's fields and woods, and the bridge over Mill creek, were not finished by the said company, or by the contractors employed by them, during the time that the plaintiff was engaged in his work; and that the effect of the want of these structures, and particularly of the bridge over Mill creek, was to increase the length of haul of material, by the difference between the circuit actually travelled in going around the place where the bridge was to be built, and the distance which would have been travelled if the bridge had been constructed, so that he might have passed over it in hauling the material from the place of excavation to the place of embankment.

The culverts were finished some time in November, the contractor having been delayed in getting the stone needed for the purpose; but the inconvenience for the want of the culverts was slight as compared to the inconvenience for the want of the bridge over Mill creek; and that from being compelled to pass around the site of the bridge, the carts carried less by one-third or one-fourth of a load than they could have carried if the bridge had been built, and they had gone over the bridge.

The said witness further stated, that he received information from Mr. Farquhar, an assistant engineer, on the 16th December, 1836, that Howard was making the embankment in the river, against the cribs in the river, and that the cribs were yielding to the pressure of the earth thrown against it. Witness returned to the work on the 22d December, 1836, and found that the cribs were giving way, and he peremptorily ordered the plaintiff not to place any more earth there. John J. Heckert was contractor for building the cribs of the embankment; there were two cribs to be built, one at the side of the embankment, the other in front of the embankment at its termination in the river.

The said witness described the crib in part as constructed in the river, beyond the embankment intended to be made, but in immediate juxtaposition to the intended embankment, as shown on the said profile at the point marked by the figures.

The said crib was formed by driving piles into the bottom of the river, and was intended to be filled with stones; but Mr. Heckert had been delayed in some way in making his crib complete, and at the time spoken of it was not filled with stones, and when the earth was thrown against it, the pressure of the earth against the structure had the effect of making it tilt; and this result took place because it had been constructed, according to the plan of William Strictland, the engineer, who had projected the work without ties. When witness ordered the plaintiff to desist from throwing more earth on that part of the embankment, he requested witness, as engineer in charge, to point out a place where he might waste the earth. This witness refused to do, having orders not to point out to contractors any place on which to waste their excavations. The effect of the order of this witness to said Howard to desist from the further delivery of earth at the crib, was to oblige him to suspend work altogether for a week or ten days, as he had no place to throw his earth from the excavations; the embankment of the river having been completed to the extent originally contemplated, as described in the

letter from Stabler to Howard, dated on the 2d day of November, 1836, hereinafter referred to; and witness further proved that said Howard frequently afterwards applied to witness to point out a place to waste or deposit his earth, which witness always under instructions declined to do; and that upon one occasion, when said Howard had obtained from Mr. Heckert permission to deposite said earth upon a field of said Heckert's, said Howard applied to witness for leave so to do, which witness refused to give, but forbade his making said deposit upon said Heckert's field.

After this plaintiff ceased gradually to do any work; about the 6th of January he ceased to work at all; he did very little work in January, Howard having obtained from John Stump permission to deposit the top or soil earth on his lands, proceeded to work on that part of the road 'till he had got off said soil, when Stump refusing permission to deposite any other portion of the excavations on his land, and witness refusing to point out any other place where it might be deposited, Howard ceased to work altogether. The said witness further stated, that the weather that season was of extreme and unusual rigor; and the excavations accomplished during the day were frequently frozen over night, and had to be again done next morning; that it was sometimes necessary to use powder, in order to blast the frozen earth, it became so hard and difficult. The said witness further stated, that the contract was declared abandoned on the 18th January, 1837, by the company.

Cross examined.

The said witness being asked, on cross examination, when and where powder was used on any part of said road in blasting earth, stated, that it was used by Mr. Clark, a contractor on the road, near Charlestown, on the 16th January, 1837. He further stated that it would cost about $150 to make a temporary bridge over Mill creek.

The water at the culverts was slight; it was not such an interruption or impediment as contractors usually complain about.

In relation to the first mile he stated that on the 17th of October he reported that the same was not finished, but nearly so; he says that it was in fact finished, except the dressing, and that this was not done while he remained on the road, and could not be done until the bridges and culverts were finished, which were not so finished until the spring of 1837.

Being asked from whom he received the instructions not to point out any place for the plaintiff to waste his earth, he stated that he was at one time riding with Mr. Stabler, then chief engineer, and that Mr. Stabler called his attention to the fact that a particular contractor has provided a place whereon to waste his surplus excavation, and that he remarked it was a very good rule to let them procure places themselves whereon to waste their surplus excavations.

The said witness further stated that the upper excavation is generally the easiest done; and that the part of the work left unfinished by the plaintiff was more difficult than the part which he had done.

He further stated, that the embankment at the river was intended and laid out to be 650 feet, from the water line to the outer crib, to wit, from station 290 to station 266⅔, each station being 100 feet. The embankment so increased before the change of plan was intended and laid out to be 100 feet wide; and that the embankment, if made, would have required all the excavations from the road after such alteration.

There was no earth from the excavations, but what would be wanted for the embankments according to such altered plan, including the embankment at the river.

Examination in chief resumed.

The said witness being again examined in chief stated, that if the plaintiff had not been interrupted in his work, he could have completed the same by the time mentioned in the contract. He was interrupted in September by the injunction, which continued until late in October, and afterwards by Heckert's omission in December to have the cribs in proper condition to receive the earth.

The plaintiff then read in evidence to the jury the following acts of the general assembly, (which it is agreed need not be inserted in this exception, but may be read in the Supreme Court from the printed acts,) to wit:

Act of 1831, chap. 296.
Act of 1835, chap. 93.
Act of 1837, chap. 30.

The plaintiff also offered in evidence the following copy of the record of agreement of union:

Copy.

Agreement between the Wilmington and Susquehanna Railroad Company, the Baltimore and Port Deposit Railroad Company, and the Philadelphia, Wilmington, and Baltimore Railroad Company.

Articles of union.

Articles of union, made and concluded this fifth day of February, in the year of our Lord one thousand eight hundred and thirty-eight, between the Wilmington and Susquehanna Railroad Company, the Baltimore and Port Deposit Railroad Company, and the Philadelphia, Wilmington, and Baltimore Railroad Company, by virtue and in pursuance of an act, of the general assembly of the State of Delaware, entitled a further supplement to an act entitled an act to incorporate the Wilmington and Susquehanna Railroad Company; and of an act of the general assembly of Maryland, entitled an act to authorize the Union of the Baltimore and Port Deposit Railroad Company, the Wilmington and Susquehanna Railroad Company, and the Wilmington and Baltimore Railroad Company; and of an act of the general assem-

bly of Pennsylvania, entitled an act supplementary to the act incorporating the Philadelphia, Wilmington, and Baltimore Railroad Company.

First. The said three corporations are hereby united, and from and after the first election of directors hereinafter provided for, in the third article, shall be merged into one body corporate, under the name and style of the Philadelphia, Wilmington, and Baltimore Railroad Company, and the stocks of the said three corporations so united shall form one common stock, and all the estate, real, personal, and mixed, and the rights, privileges, advantages, and immunities belonging to each of the said corporations, become and be vested in the said body corporate, and the debts and libilities of each of the said corporations shall be deemed, and are hereby declared, to be the debts and liabilities of the said body corporate.

Second. The stock of the said body corporate is hereby divided into shares of fifty dollars each, of which the present stockholders of the Wilmington and Susquehanna Raiload Company are hereby declared to be entitled in all to sixteen thousand shares; the present stockholders of the Baltimore and Port Deposit Railroad Company, to nineteen thousand shares; the present stockholders of the Philadelphia, Wilmington, and Baltimore Railroad Company, to ten thousand shares, including those forfeited heretofore, which are to be held for the use of this corporation, and certificate of stock as may be regulated by the president and directors of the body corporate, shall be granted and issued accordingly to each of said stockholders, so soon as the said stockholders shall have paid up all instalments due upon the shares of stock held by them respectively, and shall have surrendered the certificate previously issued to them as stockholders in the respective companies hereby united, and the capital stock of said corporation shall consist of such number of shares, as aforesaid, subject to the right and privilege of increasing the same from time to time according to the provisions of the respective charters of the said companies hereby united.

Third. There shall be fifteen directors to manage the affairs and business of the said body corporate, and a meeting of the stockholders of the three corporations hereby united, for the election of the first directors shall be held at Wilmington, on Wednesday, the fourteenth day of February, instant, of time and place of which meeting notice shall be given by the present president of the Wilmington and Susquehanna Railroad Company, by advertisement in at least three newspapers; at which meeting fifteen directors shall be elected by the said stockholders voting in person or by proxy, and each share being entitled to one vote, and the directors so elected shall hold their offices until the ensuing annual meeting of the stockholders, and until their successors are elected.

Fourth. The stated meetings of the stockholders shall be held in the city of Wilmington, on the second Monday of January, in each and every year thereafter, at which time and place an annual election of di-

rectors shall be made by the stockholders, and fifteen days' notice of the time and place of each stated meeting shall be given by advertisement in at least three newspapers; the election shall be by ballot, and each share of stock shall entitle the holder thereof to one vote, to be given either in person or by proxy, provided it has been held for three calendar months before the time of voting; the directors shall, after the first and each subsequent election, choose by ballot one of their own number to be president of the said body corporate, who shall serve one year, or until the election of a successor; the omission to hold an election for directors at the time prescribed shall in nowise affect the said body corporate, but such election may be had upon due notice from the said president and directors, published as aforesaid, at any time within three months after the time so prescribed as aforesaid.

The directors shall hold their offices for one year, and until a new election shall take place; and the powers of the said president and directors shall be the same as are now vested in the president and directors of the Wilmington and Susquehanna Railroad Company. The president may be removed from his office by a vote of two-thirds of all the directors; the directors may, in each year that they may deem it advisable, elect a vice-president from their own number, who, in the absence of the president, shall have all the powers of the president, and shall be liable to removal in like manner as the president. Five directors shall constitute a quorum for the transaction of business. The directors may, if they shall deem it advisable, appoint an executive committee of six members, from the States of Pennsylvania, Delaware, and Maryland, for such time and for the performance of such duties as any resolutions of the directors, or any by-laws, may prescribe and assign; and the president and vice-president, and any two members of such committee, shall constitute a quorum thereof. All officers and agents of the corporation other than directors shall be appointed by the directors, who may prescribe and exact such security as they may deem proper for the performance of their duties.

Fifth. The stated meetings of the board of directors shall be held alternately at Wilmington and Philadelphia, and special meetings may be held either at Wilmington, Philadelphia, or Baltimore; the corporation shall have offices at Wilmington, Philadelphia, and Baltimore, at either of which transfers of stock may be made, under such regulations as the board of directors may prescribe.

Sixth. All by-laws shall be made, altered, or repealed only by a majority, consisting of not less than two-thirds of all the directors; it being understood that no by-law shall contravene any of the terms or stipulations; and the existing by-laws of the Wilmington and Susquehanna Railroad Company shall, until altered or repealed as aforesaid by the by-laws of this corporation; and all rules and regulations necessary for the management and conduct of the business of the company not provided for in a by-law, may be made by the directors.

In witness whereof the said corporations, parties to this agreement,

have caused their respective corporate seals, attested by the signatures of their respective presidents, to be hereunto affixed, the day and year first herein before written.

[Seal of the Wilmington and Susquehanna Railroad Company.]

JAMES PRICE,
Pres't Wil. and Sus. R. R. Co.

[Seal of the Baltimore and Port Deposit Railroad Company.]

J. I. COHEN, Jr.,
President Baltimore and Port Deposit Railroad Company.

[Seal of the Philadelphia, Wilmington, and Baltimore R. Road Company.]

M. NEWKIRK,
Pres't Phil'a, Wil. & Baltimore R. R. Co.

In pursuance of the provisions of an act of the general assembly of Maryland, entitled "an act to authorize the union of the Baltimore and Port Deposit Railroad Company, and the Philadelphia, Wilmington, and Baltimore Railroad Company, the Wilmington and Susquehanna Railroad Company; the Baltimore and Port Deposit Railroad Company," and the Philadelphia, Wilmington, and Baltimore Railroad Company, do hereby certify, under their respective corporate seals, attested by their respective presidents, that the within and foregoing instrument is a true copy of an agreement for the union of the said companies, made and concluded on the fifth day of February, A. D. eighteen hundred and thirty-eight.

[Seal of the Wilmington and Susquehanna Railroad Company.]

JAMES PRICE,
Pres't Wil. and Sus. R. R. Co.

[Seal of the Baltimore and Port Deposit Railroad Company.]

J. I. COHEN,
Pres't Balt. & Port Deposit Railroad Co.

[Seal of the Philadelphia, and Wilmington, and Baltimore Railroad Company.]

M. NEWKIRK,
Pres't Phil'a, Wilmington, and Baltimore Railroad Co.

Received to be recorded the 12th day of February, 1838, at 5 o'clock, p. m.; same day recorded and examined, &c.

THO. KELL, *Cl'k.*

True copy.
Test,

A. W. BRADFORD, *Cl'k.*

The plaintiff then offered in evidence the following copy of the injunction issued at the suit of John Stump:

MARYLAND, *sct.*

The State of Maryland, to the Delaware and Maryland Railroad Company, its president, directors, agents and servants, of Cecil county, greeting:

[Great Seal.]

Whereas John Stump hath exhibited to us in our court of chancery his bill of complaint against you, the said Delaware and Maryland Railroad Company, for relief in equity, and to prohibit and enjoin you, the said Delaware and Maryland Railroad Company, your president and directors, agents and servants, and each and every of you, to forbear, desist, surcease, and refrain, absolutely and altogether, from making, constructing, or completing the wharf contemplated and laid out by you, the said Delaware and Maryland Railroad Company, from the lot leased by the father of the said complainant to Martha Coffield, on the Susquehanna river, and from all and every act whatsoever, towards the making, completing, or using, in any manner, the said wharf, or any part thereof, and from placing any stone, gravel, earth, logs, timber, boards, or any other substance or material, on said wharf, or any part thereof, in the said river, and from driving down piles or timbers in said river, and from every other and further act touching or affecting the said wharf commenced by you from the Cecil shore of the Susquehanna river, until the matter shall be heard in equity. We therefore do hereby command, and strictly enjoin you, the said Delaware and Maryland Railroad Company, your president and directors, and agents and servants, that from henceforth you, and each and every of you, do absolutely forbear, desist, surcease, and refrain altogether from making, constructing, or completing the said wharf contemplated and laid out by you, the said Delaware and Maryland Railroad Company, from the lot leased by the father of the said complainant to the said Martha Coffield, on the Susquehanna river; and from all and every act whatsoever towards the making, completing, or using in any manner the said wharf, or any part thereof, and from placing any stone, gravel, earth, logs, timber, boards, or any other substance or material on said wharf, or any part thereof, or in the said river, and from driving down piles or timber in said river, and from any other and further act touching or affecting the said wharf commenced by you, from the Cecil shore of the Susquehanna river, until the further order of the court of chancery.

Witness the honorable Theodorick Bland, esquire, chancellor, this 13th day of September, 1836.

Test. RAMSAY WATERS,
Reg cir. court.

In chancery, 13th Sept., 1836.

Ordered that writs of subpœna and injunction issue as prayed by the foregoing bill of complaint. And it is further ordered, that at any time after the said defendants have filed their answers, the court will hear a motion to dissolve the said injunction, provided the said defendants give to the said plaintiff, or his solicitor, ten days' notice thereof; and the register is directed to endorse a copy of this order on the said writ of injunction, that it may be served therewith on the said defendants.

THEODORICK BLAND, *Ch.*

Injoined.

NOBLE PENNINGTON, *Sh'ff.*

MARYLAND, *sct.*

[SEAL.] I hereby certify that the aforegoing is a true copy from the record of proceedings of the State of Maryland, court of chancery.

In testimony whereof I have hereto set my hand, and affixed the great seal of the said State, this 25th day of August, 1840.

RAMSAY WATERS,
Reg. cir. court.

But the defendant, by its counsel, objected to the admission of the same in evidence; but the court overruled the said objection, and permitted the same to be read in evidence to the jury, for the purpose of showing the fact that an injunction had issued, which it was admitted had been served on Howard on the 17th of September, 1836, and as furnishing evidence of excuse on the part of said Howard for his failure to complete the work to be done under his contract by the time therein specified, and the same was accordingly read; to the admission of which said paper in evidence the defendant, by its counsel, prayed leave to except, and that the court would sign and seal this its fourth bill of exceptions, and which is accordingly done, this 9th day of November, 1850.

R. B. TANEY, [SEAL.]
U. S. HEATH. [SEAL.]

Defendant's fifth bill of exceptions.

SEBRE HOWARD
vs.
THE PHILADELPHIA, WILMINGTON, and Baltimore Railroad Company.

5th bill of exceptions.

Evidence of John Stump.

The plaintiff, in addition to the evidence in the preceding bill of exceptions, proved by John Stump, a competent witness, that the said section No. 9 was in part through his land, and that he was occasionally on the work, and as far as he knew and observed the plaintiff was attentive and industrious. He appeared to have a good number of hands, from 100 to 150, and carts and horses in proportion.

Evidence of John J. Heckert.

The plaintiff also proved, by John J. Heckert, a competent witness, that he was the contractor for building the cribs for the embankment at the river, and that he and Howard were both stopped by the injunction at the suit of John Stump until it was suspended. Howard, however, was only stopped at the west end of his work, as the injunction only covered the proposed embankment at the river. After the injunction was suspended, plaintiff proceeded with his work. The carrying

on of his work was not dependent on the crib in the river; the embankment under the change of grade was 650 feet long and 100 feet wide, and there was much space whereon Howard could have placed the earth from his excavations to make the said embankment. The cribs were not finished until the spring of 1837, but the cribs would have been finished in time but for the injunction, if witness could have procured the necessary timber. The defect of the cribs was in the plan of their original construction, which was furnished by the engineers of the defendant, and was not the fault of the witness, who remedied the defect by the application of additional land ties, which gave steadiness to the work. The effect of this defect was to interrupt Howard in the prosecution of his work, which was suspended for eight or ten days. The said witness further stated, that the winter set in tolerably early in December, but he cannot specify the precise time; it was a very severe winter.

Cross examination.

The said witness being cross examined, admitted that the following letter, shown to him by defendant's counsel, was written by him to the President of the Wilmington and Susquehanna Railroad Company on the day of its date:

PORT DEPOSIT, *Dec.* 21, 1836.

MR. JAMES CANBY:

DEAR SIR: I take the liberty of addressing you on account of some timber which Mr. Jones, (at Principe,) got from me for the use of the Railroad company; you will perceive from the bill that I let him have it, was for the use of the Wilmington and Susquehanna Railroad Company, and when he presents that bill I hope you will retain it in the hands of the company for me. (The timber I wanted to put between piers to keep them from coming together.) I am pushing along with the wharf as fast as the weather permits. Last week there was an alarm given about the wharf; the embankment is carried out so high that it pressed so hard against the foot of the land ties, that they pressed the top of the wharf out about 6 inches, but I stopped them, and had them to throw the earth over against the foot of the wharf, which brought it up again, and I am now raising on it, and I hope it will continue in its place. If Mr. Howard will only carry up the embankment level with the wharf, there will be no doubt of its safety, as the weight of the earth on the land ties will keep it straight.

I remain, with respect, your most obedient,

J. J. HECKART.

The said witness, however, stated, that when he wrote said letter the land ties were not constructed. He further said, that the plaintiff could not have completed his work at the contract price; that he could not have completed it for 50 cents per cubic yard for excavation; that if he had completed it, his loss would have been equal to as much

more per cubic yard as at contract price; that it would have cost him twice as much to do the work as the work at said price would have been worth. The work left unfinished by the plaintiff was executed by William Slater and witness, (who had no allowance for overhauls,) for the company at 32 cents per cubic yard for excavation, except such portion of the work as they were released by the company from doing.

He and his partner were very attentive and industrious, and they commenced in March, about the 10th of the month, and continued on until some time in July. The portion of the work done by him and Slater was much more difficult than the work done by plaintiff, and they had the advantage of spring and summer to do their work. They divided between them $1,800, and out of this they had to pay their board and personal expenses, and the stock and materials procured for the work were valued at their cost, although much worn and injured.

Evidence of R. P. Dowden.

The plaintiff also proved, by Raymond P. Dowden, that he was the principal manager of the plaintiff's work, and had the charge at that time of the whole business; that he is unable to say how many men the plaintiff had; sometimes 200, sometimes 150; he thinks the plaintiff had 160 men when he ceased operations; the work was commenced on the 23d of July, 1836; it was commenced at the river, and was proceeding very well when they were stopped by the injunction. The plaintiff did not know what to do when he was thus stopped; Mr. Stabler said they must not discharge their hands, not a man, or horse, or cart, and that the company would see that he was paid for his loss; at that time only a small force was on the eastern part of the road, nearly the whole force was at the river; the injunction was laid about the 17th of September, 1836. The plaintiff was thus forced by Mr. Stabler's orders not to discharge the hands, to concentrate his whole force on the eastern part of the road. The men had to go about two miles to get to their work; they lost much time, and were much worried by the long distance to their work and their meals; the wages paid at that time was a dollar and an eighth for men; a dollar and a half for carts, including the driver. Independently of the men sent from the western end to work on the eastern mile, there were enough men at work on the eastern end for the extent of work to be done there. But, as they could not work on the western end, all the force was placed on the eastern end.

The said witness further testified, that the plaintiff sustained great loss for the want of crossings over the places where the culverts and bridge were to be built; and that if the culverts and bridge had been built, when he was engaged in working, he could have passed conveniently from one part of his work to another, and could have saved distance in the length of his haul, and could have carried heavier loads.

The said witness further testified, that the plaintiff left the work in January, 1837; his contract was forfeited by the company; the men

were discharged early in that month; plaintiff had no means to pay them, and had to sell his property and store goods, and even his riding horse, to pay the men; they were clamorous and threatening, and as the company refused to pay the plaintiff the balance of his estimate over the one thousand dollars paid him, he had no other way to pay their demands.

The said witness further testified that the plaintiff was greatly injured by being deprived of the right to complete his work; the excavations, by the aid of a tram road, could have been done for 16 cents per cubic yard; and he would thus have made 10 cents on each cubic yard, if he had been allowed to proceed with his work.

Cross examination of R. P. Dowden.

The said witness, on cross examination, further stated, that books were kept by him, showing the number of men at work each day; but that he does not know where they are, unless at his residence at Bladensburg, in Prince George's county. That most of them were destroyed, and being requested to send for and produce the same by the defendant's counsel, produced the only book in his possession, which said counsel examined but declined to use.

Examination in chief resumed.

Said plaintiff further proved by said witness, that the effect of the injunction before referred to was to throw said Howard in the prosecution of his work six weeks, or nearly so, later into the fall, when, by the combined action of the sun and frost, his operations were rendered greatly more difficult and more expensive, to the extent of at least one-third, upon the work done by him.

The said witness further testified, that the plaintiff was allowed to waste earth in Stump's woods, but he cannot say to what extent.

Evidence of Francis Beatty.

The plaintiff also proved, by Francis Beatty, a competent witness, that he was one of the managers or bosses on the plaintiff's work; that the plaintiff had at one time 150 men and 64 carts, and was proceeding very well with the work until he was stopt by Stump's injunction. After this, the men under his charge were placed to work on the eastern portion of the section, or the eastern mile. The loss was great in going to and from the work in consequence of the distance the men and carts had to go. The said witness further stated that he was manager on the work near the water, and that the work was conducted with as much expedition as could be done under the circumstances. The grade of the road was altered and was considerably sunk, and the road near the river was increased in its width very greatly. The winter was very cold and the ground was much frozen. The plaintiff stopt working about the first week in January. The plaintiff then read in evidence to the jury the following estimates:

Sec. No. 9, Md.—Estimate 1.

The Wilmington and Susquehanna Railroad Company, to S. & Hiram Howard, Dr.

1836.			
Sept. 1.	10,444 c. yds. 26 cts. - - -		$2,715 44
	1,430 c. yds., 900 feet haul, at 27½ -		393 25
	1,144 " 1,000 " " 29 -		331 76
	1,128 " 1,100 " " 30½ -		344 04
	994 " 1,200 " " 32 -		302 08
	267 " 1,300 " " 33½ -		89 49
	15,357		4,176 06
	Deduct 15 per cent. - - -		626 04
	I certify the above is correct. WM. H. VINING, *A. E.*		
	Ex'd. J. C.		
	Due - -		$3,550 02

Received 4th October, 1836, of Allan Thomson, treasurer, three thousand five hundred and fifty dollars two cents, in full of the above account.

S. & H. HOWARD.

Sec. No. 9, Md.—Estimate 2.

The Wilmington and Susquehanna Railroad Company, to S. & H. Howard, Dr.

1836.			
Oct. 1.	For excavation on station No. 9.		
	18,954 cub. yds., 800 ft. haul.		
Deduct	10,444 " " former estimate.		
	8,510 " " present estimate, at 26 cts.		$3,212 60
	1,500 " 900 ft. or haul.		
Deduct	1,430 " " former estimate.		
	70 " do. present estimate, c. 27½ -		19 25
	2,906 do. 1,000 ft. or haul.		
Deduct	1,144 do. former estimate.		

ESTIMATE No. 2—*Continued.*

1836.			
Oct. 1.	1,762	cub. yds. present estimate, at 29 -	510 98
	2,124	do. 1,100 ft. or haul.	
Deduct	1,128	do. do. former estimate.	
	996	do. do. present estimate, at 30½ -	303 78
	1,317	do. 1,200 ft. or haul.	
Deduct	944	do. do. former estimate.	
	373	do. do. present estimate, at 32 -	119 36
	1,668	do. 1,300 ft. or haul.	
Deduct	267	do. do. former estimate.	
	1,341	do. do. present estimate, at 33½ -	449 23
			3,615 20
		Deduct 15 per cent. - - -	542 28
		I certify the above quantities are correct. W. H. VINING, *A. E.*	
		Due - -	$3,072 02

Received 4th October, 1836, of Allan Thomson, treasurer, three thousand seventy-two dollars ninety-two cents, in full of the above account.

S. & H. HOWARD.

3d estimate, 9th section.

The Wilmington and Susquehanna Railroad Company, to S. & H. Howard, Dr.

1836.	For excavations and extra hauling, as follows, viz:	
Nov. 1	Full quantity excavated 46,034 yards, *a* 26 cts. per yard - - - - -	11,968 84
	Of the above quantity 14,218 yards were overhauled over the 800 feet average haul of contract, at a mean distance of 950 feet at 1½	

ESTIMATE—*Continued.*

1836. Nov. 1.	cent per yard for 100 feet, viz., allowance for hauling 14,218 yards at 14¼ cents -		2,025 96
			13,994 80
	Deduct former payments on the above, viz:		
	On estimate No. 1 - -	$3,550 02	
	On estimate No. 2 - -	3,072 92	6,622 94
			7,371 86
	Deduct 15 per cent. - - - -		1,105 77
			6,266 09
	Deduct advance made 12th October - -		600 00
			$5,666 09

I certify the above quantities and measurements are as reported by Wm. H. Vining, assistant engineer.

JAMES P. STABLER.

Received 8th November, 1836, from Allan Thomson, treasurer, five thousand six hundred sixty-six dollars nine cents, in full of the above account.

S. & H. HOWARD.

4th estimate.

The Wilmington and Susquehanna Railroad Company to S. & H. Howard, DR.

1836. Dec'r 1	For excavation and hauling of earth, viz:		
	Full quantity excavation 56,922 cubic yards at 26 cents - - - -		$14,799 71
	18,796 cubic yards of the above were hauled a mean distance of 1,125 feet over the average haul of 800 feet of contract, at the rate of 1¼ cent per 100 feet per cubic yard.		
	18,796 cubic yards at 16,875 cents per yard -		3,171 82
			17,971 54
	Deduct 15 per cent. - - - -		2,695 73
			15,275 81

ESTIMATE—*Continued.*

1836.	Deduct former payments, viz:		
Dec'r 1.	For estimate No. 1 - -	$3,550 02	
	Do. do. do. 2 - -	3,072 92	
	Advance made 12th October -	600 00	
	For estimate No. 3 - -	5,666 09	12,889 03
	Balance due on this estimate - -		2,386 78

Examined.

I certify the above to be correct.

W. FARQUHAR, *A. E.*

Received 13th December, 1836, of Allan Thomson, treasurer, twenty-three hundred eighty-six dollars seventy-eight cents in full of the above account.

S. & H. HOWARD.

Estimate 5 for section 9.

The Wilmington and Susquehanna Railroad Company, to S. & H. Howard, Dr.

1837.		
Jan'y 1.	70,757 cubic yards of earth, at 26 per -	$18,396 82
	Extra.	
	19,345 cubic yds. of the above were hauled an average distance of 1,100 ft. over the "average haul of 800 ft.," at an additional price of 1½ cts. per cubic yard per hundred feet.	
	19,335 cub. yds., at 16 $\frac{9}{11}$ cents per cubic yd.	3,277 28
		21,674 10
	Deduct 15 per cent. - - - -	3,251 11
		18,422 99
	Deduct former payments - - -	15,275 81
		3,147 18
Jan'y 4.	Advance deducted - - - -	1,000
		$2,147 18

I certify the above to be correct. W. FARQUHAR, *A. E.*

It was admitted that after the plaintiff had ceased to work an estimate was made, amounting to $332 42. This latter estimate was made late in January, 1837, and embraced the work done by plaintiff during that month, and the odds and ends of work previously done and not included in former estimates.

The plaintiff further proved, by said witnesses, that the work done upon said section, already described, was done entirely by the plaintiff, without any participation therein by Hiram Howard, and that said Hiram was at no time upon said road whilst said work was in progress.

Evidence of Farquhar, witness for defendant.

The defendant then proved by Farquhar, a competent witness, that he was in the service of the Wilmington and Susquehanna Railroad Company from about the middle of October, 1836, until the road was completed.

He was the resident engineer during the whole period, from northeast to the Susquehanna river, and section No. 9 was within his residency, but was subordinate and assistant to George F. De la Roche, the principal assistant engineer on said work. He went upon said section about the last of October, 1836. The eastern or first mile of section No. 9 was not then finished; and it was not in fact finished until May or June, 1837, and was then finished by Mr. Slater, who was one of the contractors on said section, after the plaintiff had left the work. The whole plan of the work was changed about the time he went upon the road. The grade was sunk, and the width of excavations near the river greatly increased. The embankment of the river, under this altered grade, was intended to be 650 feet from its eastern termination at station 290, and its width 100 feet.

The plaintiff ceased to work on said section in the first week in January. He had but a few men, and no carts that witness remembers, during the week of January that he was at work. Late in January, 1837, witness, assisted by Mr. Briggs, also an engineer, made an estimate of the work done, which had not been embraced in the estimate made for the work done in December, 1836, and it amounted to $332 42. It also included such portions of work, previously done, as had not been included in previous estimates.

The said witness testified that all the estimates were carefully and accurately made, and are correct and full. The said witness further stated, that in computing the average haul it is proper to bring into view all hauling under the average as well as hauling over the average of 800 feet; and that in this way the true average haul is ascertained. The said witness further testified that there was no necessity, in order to the convenient performance by plaintiff of his work in hauling material from the excavations to the embankment, that there should have been any over either of the culverts, and that a temporary bridge sufficient for all purposes of convenience could have been constructed over Mill creek at the cost of $20. The said witness further testified that

the work done by plaintiff was much easier of execution than the work which he left unexecuted. If the plaintiff had gone on with his work, he would have had great difficulty. The weather was unusually severe, and he thinks it would have cost at least 50 per cent. more than his contract price. The work left unexecuted by plaintiff was afterwards let to Heckert and Slater at 32 cents per cubic yard for excavation. There was no allowance to them for overhaul. A portion of the excavation was over 1900 feet from the river; and a good deal was about 1200 feet. This was to the river, but the embankment intervened, and this was 650 feet from the eastern termination to the river.

Evidence of Wm. Slater, witness for defendant.

The defendant also proved, by William Slater, a competent witness, that John J. Heckert and the witness, as a firm, entered into a contract with the Wilmington and Susquehanna Railroad Company for the completion of section No. 9, left unfinished by the plaintiff. They commenced the execution of the work about the 5th March, 1837, and continued until some time in July, 1837, in vigorous prosecution of the work. They employed as much force as they could crowd on the work, and it was prosecuted vigorously and industriously. No efforts were left unspared. They so far completed the work that the road was opened on the 4th July, 1837; this was done by excavating a space for the laying of the rails. Afterwards they continued to work, and were very glad when the company took the work off their hands, and released them from the execution of the balance of the work. They were allowed 32 cents per cubic yard for the excavation, and three dollars and a half per cubic yard for rock. But for allowance on rock they would have lost money; as it was, they only divided a sum less than $1,800, each receiving less than $900; out of this they had to pay their board, travelling expenses, and other personal expenses; and they divided their stock of horses, implements, and utensils at cost, although they were greatly lessened in value by the service and wear and tear of the work on said section.

The said witness testified that the plaintiff could not have finished the work at the same price, nor at any price, if he had continued with his work in January, 1837, and afterwards. The portion which plaintiff had done was much easier of accomplishment than the portion which he had left to be done.

Evidence of Windle, witness for defendant.

The defendant also proved by Windle, a competent witness, that he was the clerk or superintendent of Heckart and Slater, in their execution of their contract for the work on said section No. 9. There was much embankment to be made at the river; the earth excavated by Heckart and Slater was upwards of 50,000 cubic yards, and a very large portion of this quantity was needed for the embankment at the river, and was actually used there; nearly forty thousand cubic yards must have been used at the embankment at the river.

The said witness further testified that he has been much engaged in the performance of contracts on public works, and that the practice is universal and uniform that the contractors shall provide bridges and crossings from one part of the work to another. The said witness also testified that the cost of a bridge, such as would answer all the purposes of a bridge over Mill creek for the purposes of a contractor, would not exceed twenty dollars.

The defendant also proved by said William Slater that he has been a contractor for many years on many public works, and that the usage and practice is universal that the contractor shall make his bridges for crossings from one part of his work to another; the same witness also testified that the embankment at the river, as left by plaintiff, was in a condition not only to receive, but to require, for its completion, at least forty thousand cubic yards of earth.

Further examination of G. F. De la Roche on the part of plaintiff.

The plaintiff then proved, by George F. De la Roche, that he had made an accurate calculation of the comparative quantities of excavation which it would have been necessary to waste if the work had been completed according to its original plan, as laid down on the profile and as staked out on the ground, at the time said contract of 12th July, 1836, was made, and the excavations that were rendered necessary by the alterations in the grade and width of the road. According to the original plan the excavations would have been only the quantity of 82,899 cubic yards; and according to the alterations the quantity would have been 172,743 cubic yards, being an increase of 89,844 cubic yards. The plaintiff also proved by the said witness, that his mode of calculating the overhaul, over an average of 800 feet, was to make no allowance for any hauling within the distance of 800 feet, but to allow all over 800 feet. The said witness also testified that estimates *were* made by engineers prior to the final estimate are not to be relied on, and that the only true and reliable estimate is the final estimate.

Cross examination of G. F. De La Roche.

On cross examination he stated that the estimates made on this section by his assistants were revised by him and certified, but he never verified their correctness by any actual surveys. The said witness further testified, that the work done by the plaintiff, after the alteration in the grade and width of *of* the road, was done in accordance with the new or altered plan under the direction of witness as engineer.

Evidence of J. Murray, witness for defendant.

The defendant then proved, by James Murray, a competent witness, that he has been practically engaged as engineer on public works, and that it is the usage, unvarying and universal, for contractors to provide crossings from one portion of their work to another. The same witness also testified that in ascertaining the average overhaul over 800 feet, respect is to be had as well to all that is under 800 feet as to what is over 800 feet.

Evidence of B. H. Latrobe, witness for defendant.

The defendant further proved, by Benjamin H. Latrobe, a competent witness, that he is by profession a practical engineer, and has been for many years engaged as the chief engineer of the Baltimore and Ohio railroad company, and has had long experience in the matter of contracts on public works; and that it is the uniform and universal usage, so far as he knows, and as he believes, that the contractor shall provide the bridges from one portion of the work to another. The bridges and culverts are usually erected contemporaneously with the graduation of the road; and except in case of special contract on the part of the company to provide facilities of crossings, the contractor is bound to provide in this respect for himself. The said witness further testified, that in calculating average haul the hauling under the specified distance, as well as all that is over said distance, is brought into the computation.

Evidence of James Canby, witness for defendant.

The defendant then proved, by James Canby, that he was president of the Wilmington and Susquehanna Railroad Company from its first organization until the road was finished in July, 1837. Shortly before the union with the Philadelphia, Wilmington and Baltimore Railroad Company he resigned the presidency, and Price was then appointed president in his place, and said Price continued to be the president until the union, in February, 1838. The said witness further testified that section No. 9 was the difficult part of the road, and it was a matter of primary importance to have it completed with the least possible delay. Leslie and White were the first contractors, and they were induced to relinquish it at the instance of the board, and it was then let to Sebre and Hiram Howard; the terms and price, and other essentials of the contract, were entered into on the 12th July, 1836; and on that day two papers were prepared, and were then signed by him, and also signed by Sebre Howard; and deponent, as president of the company, expressly directed the secretary, Mr. Brobson, that the seal of the company was not to be affixed to either paper until Hiram Howard signed and sealed both of them. The two papers, respectively marked A and B, being shown to him, he stated that they are the two papers to which he refers; that the impression of the seal on said paper A is the seal of the Wilmington and Susquehanna Railroad Company, but that said seal was not placed there, he is very positive, at any time whilst he was president of said company, and was never placed there by his authority, or by the authority of the board.

The defendant then offered to prove, by the said witness, that when the said two papers, marked A and B, were both signed by him and by said Sebre Howard, and sealed by the latter, that it was then understood between them that both said papers were also thereafter to be signed and sealed by Hiram Howard; but the plaintiff, by his counsel, objected to the evidence so offered to be given, and the court sustained the said objection, and refused to allow the same to be propounded to

said witness, or to be answered by said witness, and rejected as inadmissible the evidence so proposed to be given; to the rejection of which said evidence, and to the opinion of the court in this behalf, the defendant, by its counsel, prayed leave to except, and that the court would sign and seal this its fifth bill of exceptions, which is accordingly done this eleventh day of November, 1850.

R. B. TANEY, [SEAL.]
U. S. HEATH. [SEAL.]

Defendant's sixth bill of exceptions.

SEBRE HOWARD
vs.
The PHILADELPHIA, Wilmington, and Baltimore Railroad Company.

6th bill of exceptions.

The defendant then further proved, by said James Canby, that he had been informed that the plaintiff had abandoned the work on section No. 9; and on the 17th of January, 1837, he saw the plaintiff, and had a long and friendly interview with him, in which he, the witness, urged him to restore his force upon the work, and to resume the same, but that the plaintiff would not give him any assurance that he would do so. The plaintiff had come out to see witness at the place of business of witness, and this interview took place on that occasion. The next day a meeting of the board took place, and before the appointed hour of meeting, witness saw the plaintiff, and again urged him to resume the work, and stated to him that the board was about to meet that evening, and that his contract would certainly be forfeited unless satisfactory assurances were given that he would resume and prosecute his work. Witness prepared a paper, which was not preserved by him, and has been destroyed or lost, merely expressing that the plaintiff would go on with his work, and would restore his force. Witness stated to him that if he would sign this paper he, witness, would use his influence with the board, and he thought he would use it successfully, to prevent a forfeiture of the contract; but that unless some assurance was given to the board that he would resume the work, the contract would be forfeited. The plaintiff refused to sign said paper, and would not give the desired assurance.

The board met, pursuant to notice, on the 18th January, 1837. A quorum was present. A communication was received from the chief engineer, as follows:

Letter from Stabler to J. Canby, president, 17th January, 1837.

ENGINEER'S OFFICE, W. & S. R. R.,
Wilmington, January 17th, 1837.

To JAMES CANBY, *president*:

I regret to learn from Sebre Howard, of the firm of S. & H. Howard, contractors for the graduation of the 9th section of the Maryland division of this road, that he has for some weeks past suspended all his

work on the said section. This account is also confirmed by the reports made to me by my assistants on the work. I have endeavored to urge him on to a compliance with his engagement, but he will give no assurance that he will recommence the work as directed, and has discharged a large portion of his force, thereby evincing a disposition to retard the progress of the work, unless certain terms of the agreement, according to his construction of the article, are complied with by the board. I consider it of vital importance to the interests of the company that the graduation of this section should be effected as soon as it can be done, and it is not now in due progress of execution. Howard has not yet completed the eastern "mile of said section" according to his agreement; and the western portion is even much more behindhand; as my communications with the contractor, S. Howard, leave me no hope of his complying with the directions given for the execution of the work, I would respectfully recommend to the board that they avail themselves of the lawful powers conferred on them by the contract, and declare his work forfeited. However unpleasant such a course must be to you, I believe your interest requires that no further delay, than such as cannot possibly be avoided, should be suffered to occur in the prosecution of the graduation on this section.

Respectfully,

JAMES P. STABLER,

Chief Engineer.

The aforegoing is a true copy compared by me with original, this twenty-first day of October, A. D. 1841.

J. H. DOWNING.

Witness also reported to them what had passed between him and the plaintiff. The board thereupon passed the following resolution:

Contract declared forfeited.

Extract from the minutes of the proceedings of the Wilmington and Susquehanna Railroad Company, under date of January 18th, 1837.

A communication was received from the chief engineer, representing that the contract of S. & H. Howard for section No. 9 was not in due progress of execution, and recommending that it should be forfeited, which was read, and on motion of Mr. Gilpin the following resolution was adopted, viz:

Whereas a contract was duly executed between S. Howard (acting for himself and H. Howard) and the Wilmington and Susquehanna Railroad Company, bearing date the 12th day of July last, whereby the said S. & H. Howard contracted, for the consideration therein mentioned, to do all the grading of that part of section No. 9 of the said railroad which extends from station No. 191 to the end of the piers and wharf in the river Susquehanna, opposite Havre de Grace, according to the directions of the engineer of the said railroad, and to the specification thereto annexed, and to complete the same by the time therein mentioned; and whereas the times appointed for the completion of said contract have elapsed, and the work is not yet completed, and

the party of the second part is of the opinion that the contract is not duly complied with by the party of the first part, and that the said contract is not in due progress of execution:

Therefore, resolved, that the said contract be, and the same is hereby, declared to be forfeited.

The passage of this resolution was made known on the same day to the plaintiff. Subsequently, on the sixth day of February, 1837, the following resolution was passed by the board:

February 6th, 1837.

The president laid before the board a contract made with J. J. Heckert and William Slater, for grading section No. 9, Maryland, at 32 cents per cubic yard, &c.

Resolution 6th February, 1837.

And on motion of Mr. Bayard:

Resolved, that section No. 9, being now let for grading, the two estimates of S. & H. Howard, the late contractors on that section, which remain unpaid, be, and the same are hereby, passed and ordered to be paid to the said S. & H. Howard, upon their giving a full receipt and acquittance to the company, their 15 per cent. to be retained as forfeited to the company.

The following are the two estimates unpaid, the 15 per cent. being deducted, viz:

Amount of estimate to January 1, 1837 - - -	$3,417 18
Deduct this sum, paid January 4 - - - -	1,000 00
Balance due on this estimate - - - -	2,147 18
Amount of estimate January 28th, 1837 - - -	332 42
	$2,479 60

But shortly afterwards, suit was brought by the now plaintiff and Hiram Howard, as plaintiffs, in Cecil county court.

Cross examined.

The said James Canby, being cross examined, stated that the paper prepared by him to be executed by said Howard, he believed he tore up; that in the interview had by him with Howard he was acting on behalf of the board of directors, having been invested with authority so to do by said board; that he could not remember the contents of the paper referred to, and upon being asked by plaintiff's counsel, whether if a copy of said paper were shewn to him (said counsel holding a paper in his hand, and offering to shew it to him,) he would remember its contents; said no, and declined to look at said paper. And the said Canby further proved that he knew William P. Brobson, who during the period of these transactions was the secretary of the defendant, and a most respectable man, and that said Brobson is now dead.

Evidence of David Wilson, witness for defendant.

The defendant also proved, by David Wilson, a competent witness, that he was a director in the year 1836 of the Wilmington and Susquehanna Railroad Company, and that he had charge particularly of the western portion of the road, including section No. 9. In January, 1837, in the early part of the month, he paid a visit to said section, but saw nobody at work on it, but did not go beyond the tavern door to examine, having gone there upon other business. On his return to Wilmington he reported the fact to the board. It was an object of moment to finish this section as early as possible, as it was the difficult part of the road.

Evidence of Otho Scott, witness for defendant.

The defendant then proved, by Otho Scott, a competent witness, that he was present in December, 1847, in Cecil county court, at the trial of the cause of Sebre and Hiram Howard against the Wilmington and Susquehanna Railroad Company, and was one of the company's counsel. He stated that very soon after the plaintiffs' counsel had commenced, on their part, to offer evidence to the jury, they offered the paper, marked B, stated in a former exception in this cause, when one of the defendant's counsel objected to the admissibility in evidence to the jury upon the issue joined between the parties, upon the ground that the probata and the allegata were not the same; the declaration averring that the plaintiffs, Sebre and Hiram Howard, had entered into an agreement with said company; whereas the said paper B only proved that one of them, Sebre Howard, had executed the paper, and falsified the allegation that both had executed the said agreement. The court maintained the objection, and asked Col. Stump, one of the plaintiffs' counsel in the case, whether or not he could find a case in which it was held that an agreement, signed and sealed by one partner, thereby became the deed of the firm. No objection was made on the part of the defendant that the instrument was the covenant of the company. The case was not disposed of on that point at all, but solely and exclusively on the point of variance between the evidence and the averments in pleading.

Cross examination of O. Scott, witness for defendant.

The said witness being cross examined by the plaintiff, stated that he was one of the counsel for the said Wilmington and Susquehanna Railroad Company in said case in Cecil county court, and was their retained counsel in all cases, from an early period, but that he is not able to say from what precise date. He further testified that he cannot tell when he first saw said paper, marked A; but that when he first saw it it was sealed, as it now is, with the impression of the company's seal, and that he at no time saw it without said seal.

Evidence of Low, witness for plaintiff.

The plaintiff then offered in evidence, by Low, a competent witness, that in January, 1837, he thinks about the 18th, at the request of the plaintiff, he accompanied the plaintiff to the office of the company, and there saw Mr. Wm. P. Brobson, the secretary of the company, and that plaintiff then demanded payment of the balance of his estimate for work done in December, 1836; that said Brobson then produced a paper, and stated to the plaintiff that if he would sign said paper he, said Brobson, would pay him the balance of said estimate; and said Brobson stated that the said paper had been left with him for that purpose, by me, James Canby. The plaintiff refused to sign said paper, and Brobson refused to pay him the balance of the estimate.

The plaintiff's counsel then exhibited to the said witness the following paper:

Letter from plaintiff to defendant.

To the president and directors of the Wilmington and Susquehanna Railroad Company.

GENTLEMEN: You having understood, by my declaration last night, that I intended to abandon my contract, I hereby declare my intention of going on with it, providing you give me the benefit of a jury to condemn as much of Mr. John Stump's land as is necessary to waste my surplus material upon.

Dated Wilmington, January 17th, 1837.

Having first duly served on the defendant the notice following:

SEBRE HOWARD
vs.
THE PHILADELPHIA, Wilmington, and Baltimore Railroad Company.

To William Schley, esq., counsel for the defendant:

Notice to produce a paper.

Please to take notice to produce a paper that was written for the said Sebre to sign, as a condition on which the company was to pay him the amount of said engineer's estimate of work done in the month of December, 1836; which last mentioned paper was drawn up by the president of said company, or some other person, and dated on the 17th or 18th of January, in the year 1837, and retained by the secretary of said company upon the refusal of said Sebre to sign said paper, and asked him whether that was a copy of the said paper? The witness replied that he thinks the plaintiff took a copy of said paper, and thinks the paper exhibited to him is a copy of the paper exhibited by said Brobson to the plaintiff.

Cross examination.

The said witness on cross examination stated, that he does not know that the paper shown to him is a copy taken by the plaintiff, but it sounds to him like that paper which he heard read at the time, and that Howard then requested witness to notice and remember. Witness further proved that Howard said, "pay me my estimate so that I can

4534.

pay my hands, and I will go on with the work; the men are in rebellion for want of pay."

The plaintiff then offered in evidence the three following letters, which were admitted to be in the handwriting of James P. Stabler, the chief engineer, at the respective dates of said letters, of the Wilmington and Susquehanna Railroad Company.

Letter from Stabler to De la Roche, 23d October, 1836.

ENGINEER'S OFFICE WIL. & SUS'A. R. R'D.
October 23, 1836.

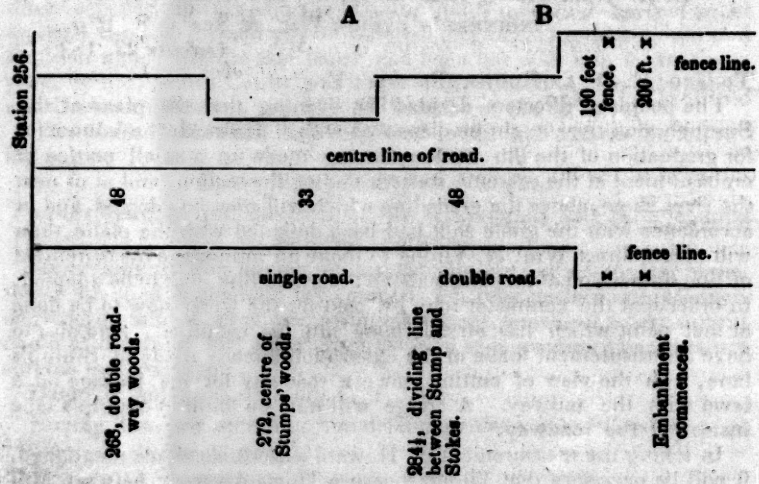
TO GEO. F. DE LA ROCHE, PT. ASS'T ENG'R:

The board of directors decided last evening that the plane at the Susquehanna river might be dispensed with. Howard, the contractor for graduation of the 9th section, having made up a small portion of embankment at the extreme western end of the section, and at or near the river shore, above the grade line which will now be adopted, and in accordance with the grade as it had been designed with the plane, thou wilt please direct Wm. H. Vining to make an immediate measurement of that embankment so placed above the grade line now to be adopted, in order that the contractor may be paid for the work now to be done at that point which has already gone into his estimate. And also to have a measurement made of the excavation already made in Stump's lane, with the view of cutting down a roadway for his passage on a level with the railway. A bridge will now be built at Stump's lane instead of the roadway.

In taking the measurement of Howard's work as above mentioned, it will be necessary that Vining measure Howard's work between Mill creek and the river, (if it has not already been done,) so far as to enable him to report all the work Howard has to perform the second time, and also that the work hereafter to be done, with the new grade, may not conflict with former measurements.

The plane being now dispensed with, it will be necessary to run out the centre line, and take the levels from station No. 256, at Mill creek, to the river, and to set in new side stakes for Howard's government in the excavation, on the entire line between said station and the river, except from the point at which the excavation for the double and single roadway meet near the eastern edge of Stump's woods. From this point to the change of grade at station 256, the road has been excavated for a double track, to obtain earth to make the embankment east of Mill creek. The grade only on this portion need be now changed. The slope stakes therefore for the new grade will be set between this point and the river, according to the following directions: First, run out the centre line from station 256 (not 258;) and from the grade at that point mark the cuttings and fillings to suit a termination of the grade at station 293 in the river, at a point 17½ feet above our (read 17½) base line. From that point, the embankment will be level to the face of the wharf. The slope stakes will then be set for continuing the single roadway to the centre of Stump's woods, and to suit the new grade, which will be about 35 feet per mile.

From the centre of Stump's woods, set the slope stakes for a double road way as far down as the dividing line between Stump and Stockton and Stoke's lot; from thence to the river shore. The excavation will be made the width of two hundred feet, that is, allow five feet on each side for the fence, and make the slopes from that down to the grade 1½ to 1 foot.



In Stump's lane have no more excavation made, and leave twenty-five feet each side the centre of the lane in railroad with excavation, no more than forty-eight feet road bed.

I shall write further particulars in a few days. The messenger is waiting, but I send this hasty direction that Vining may have these levels, measurements, &c., done, before Howard recommences his work. The object of the double roadway, from A to B, is to obtain enough earth to make up the embankment in the river; but it is possible that the point A may have to be removed east or west from the centre of Stump's woods. Not having the quantities calculated for the nett grade, I cannot say certainly where that point will be. It should go no further east than to afford the earth for the river embankment. I wish thee and Vining to calculate the quantity of excavation from B to the termination of the cut near the river, and then excavate for double roadway for the distance necessary for the remainder of the earth, and not excavate the full width within one "100 feet," unless absolutely necessary. At the deepest cut we shall have no more than room to make the double roadway, and even then the slopes may have to be reduced, or the roadway contracted. The latter would be preferable.

Respectfully, &c.,

J. P. STABLER.

Letter from Stabler to De la Roche, 28th October, 1836.

CHESAPEAKE FERRY,
Half-past 11 o'clock, a. m., Oct. 28th.

While waiting for dinner, I will just make a memorandum of the directions just given, verbally, with respect to the proper point for Howard to commence with his new embankment, to be built on the present embankment in the river, as it now stands below the newly adopted grade. The southern edge of the embankment for about 350 feet distance from the river shore, or within 190 or 200 feet of the back of the wharf, will be 15 feet from the centre line of the road, and the northern edge will be 35 feet from said centre line, as marked on the rough diagram left with thee, on the part of the embankment now formed, and below the newly adopted grade; thou wilt, therefore, please ascertain, with the instrument, how much below the grade it is, so that, in Howard's going to work again, the embankment, with a slope of one and a half to one foot, may conform, without unnecessary waste of earth, to the plan adopted in the diagram above alluded to.

As soon as practicable the calculations should be made of the quantity of earth necessary to form the embankment in the river, according to the present design; and excavating through Coffield's lot the full width, according to former directions, see how much earth will be obtained from that source to make up the embankment; then see how far from that point, say from the boundary between Coffield and Stockton and Stokes' lot, it will be necessary to go with a double, and how far with a single, roadway, to get enough earth to make up the deficiency, according to the plan laid down in my former letter.

The double road width need not be extended further from Mill creek towards the river than it stops at present, as the side ditches, increased depth of grade, trimming banks, &c., will be sufficient to make up the embankment over Mill creek bridge. Consequently, all the earth now to be excavated will go towards making up the embankment in the river, and the question is to decide how far it will be necessary to go eastward with the double roadway, with what will come from the single roadway, to make up the deficiency.

Howard wished to know whether he might cut down perpendicularly through the double roadway, and through the single roadway, on the southern side of the road, leaving the slope standing between the southern edge of the southern side ditch; and whether he might not excavate a double roadway entirely through Stump's woods, leaving the slope standing as before mentioned, so,

The propriety of this must depend upon the aforesaid calculations of the quantities; if there is enough earth without it, it may be suffered, but not otherwise. The interest of the company is to get the earth as near to the river shore as practicable, that the increased expense for hauling at Howard's prices may be avoided, at the same time having reference to the present and future wants of the company as it regards road width.

J. P. STABLER.

GEO. F. DE LA ROCHE.

Letter from J. P. Stabler to S. Howard, 2d November, 1836.

ENGINEER'S OFFICE, WIL. AND SUSQ'A RAILROAD,
Wilmington, Del., November 2d, 1836.

TO S. HOWARD, *contractor 9th section graduation:*

I gave Geo. F. De la Roche my views a few days since upon the position of the embankment in the river, and requested him to have placed 35 feet of the embankment on the northern side, and fifteen feet on the southern side, of the centre line or the railroad. Since that time, for good and sufficient reasons, I have decided that for the first 350 feet, or thereabouts, of the embankment, counting the distance from the river shore, that the embankment be placed equally on each side of the centre line of the road, making a road surface 50 feet wide, and twenty-five feet on each side the said centre line. Wilt thou, in the absence of Geo. F. De la Roche, conform to the above description in placing the earth. The first thing done I wish to be, that the earth be placed the necessary width on the southern side, as far out as the embankment now extends, and then carry out the proper position and width as thou approachest the wharf with the earth.

Respectfully,
J. P. STABLER.

The plaintiff also offered in evidence the following record of the case of John Stump against the Delaware and Maryland Railroad Company:

Record in the case of John Stump vs. *the Delaware and Maryland Railroad Company.*

MARYLAND, *sct:*

At a court of chancery for the State of Maryland, begun and held at the city of Annapolis, on the fourth Tuesday of September, in the year of our Lord eighteen hundred and thirty-six; present, the honorable Thodorick Bland, chancellor; Ramsay Waters, register; were had the following proceedings:

JOHN STUMP
vs.
THE PRESIDENT & DIRECTORS of the Delaware and Maryland Railroad Company.

Be it remembered, that heretofore, to wit, on the thirteenth day of September, in the year of our Lord one thousand eight hundred and thirty-six, came John Stump, by Albert Constable and Henry Stump, esquires, his solicitors, into the court of chancery of Maryland, and exhibited in said court his bill of complaint against the president and directors of the Delaware and Maryland Railroad Company, and James Canby, Matthew Newkirk, and David Wilson, in the words following, to wit:

Bill of complaint.

To the honorable Theodorick Bland, chancellor of Maryland:

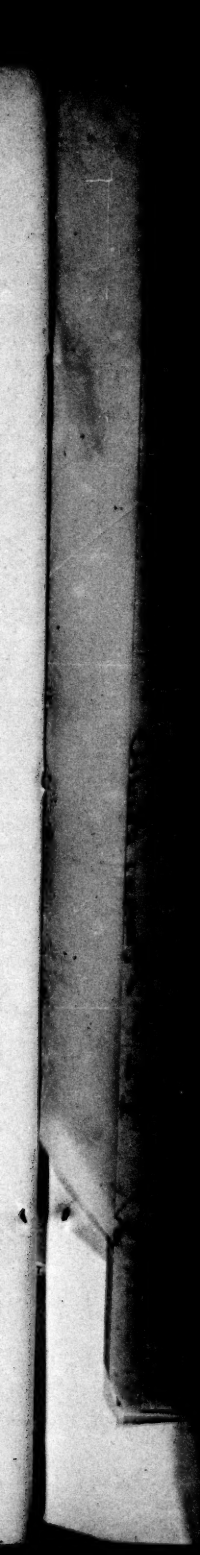
Your orator, John Stump, of Cecil county, humbly complaining shows unto your honor, that heretofore John Stump, the father of your orator, being seized and possessed in fee, under grant by patent from the State of Maryland, of a valuable tract or parcel of land, called "Perry Point," situate in Cecil county, at the mouth of the Susquehanna river, established upwards of twenty years since certain fisheries on said property, and at which, by means of seines haulded over certain portions of said river, large quantities of shad and herring were annually taken.

That afterwards the said John Stump departed this life, having by his last will and testament, executed in form and manner sufficient to pass real estate, devised said estate, with all and singular its rights and advantages of fishing, to your orator, under which said devise he entered into possession of said estate, and has always since then quietly and without any kind of interruption held, used, and enjoyed the same, together with all its rights and advantages fishery; and which said estate embraces all the same and water advantages and rights of fishery, situate on said river, as laid down and shewn by a plat made by the surveyor of Cecil county, which said plat, together with the certificate of said surveyor accompanying it, your orator herewith files, marked exhibits A and B, and prays that they may be taken and deemed part of this his bill of complaint.

Your orator further shews, that on the 2d day of March, 1811, the said John Stump leased and demised, to one Martha Coffield, of Cecil county, for the term of ninety-nine years, with covenants for the renewal thereof, eight acres of said estate, binding on said public road leading from the Susquehanna river to Charlestown, and along the said river as laid down in said plat, reference being had thereto will more fully appear, at the annual rent of one hundred dollars. That immediately below the said lot of ground leased to said Coffield one of the fisheries of your orator is situate, and the haul of the seine from which extends

along and above the shore of said lot, and over to the bar making into said river from Watson's island, which said haul is designated by a circular line dotted with pencil on the said plat, beginning at the number 16, and continuing round to the letter B, as will more fully appear by reference to said plat. That, owing to the rapidity and strength of the current of said river, a seine cannot be laid out and hauled from said fishery in any other direction than that of the said dotted pencil marks on the said plat, and that your orator, and those under whom he claims, have so used, possessed, and enjoyed said haul without interruption, and being always accustomed so to lay out their seines, for upwards of twenty years. Your orator further shews, that the Delaware and Maryland Railroad Company, a private corporation created by a statute of Maryland, passed by the legislature at its December session, 1831, have recently proposed to have purchased the said leasehold estate of Coffield in said lot of ground, and located the line of the road over the same, and have laid out, and are now actually employed in erecting, a wharf from the shore where the line of their said road terminates into the Susquehanna river, which said contemplated wharf is designated on the said plat by two lines drawn from F to A; and he further shows and avers, that the river Susquehanna is two hundred [and] forty-three perches wide at the point where the said wharf is to be erected, and that it is ninety-four perches from the Cecil shore at said point to the opposite shoal or bar formed in said river, from the lower end of Watson's island. That the wharf which said railroad company are erecting extends forty-nine perches into said river being more than one-fifth of the whole width of said river, and exceeding half its width from the Cecil shore to the bar formed from the lower end of Watson's island.

And your orator charges, that the said wharf will encroach about two hundred and fifty feet upon the channel of said river which flows between Watson's island and the Cecil shore, and extends that distance further than is necessary, to admit the safe and easy approach of any vessel navigating [said] river, or which said Railroad company can desire to employ for the purpose of crossing said river, if they have any authority to establish a ferry at said river, or to place any fixture below the high-water mark in said river, which your orator wholly denies; and he shows and avers that the said wharf, when constructed, will be an encroachment on the rights of navigation and an injury thereto, which he is advised and believe said Railroad company have no authority under their charter to interfere with. And your orator shows that he is further advised, believes, and avers, that prior to the act of assembly passed at December session, 1835, chapter 168, persons owning land on the margin of the navigable waters of this State had no lawful authority to erect wharves so as to encroach on the streams below high-water mark, and that the said statute has conferred the right on the proprietors of fee simple estates, situate on navigable waters, with an express proviso and saving in favor of the rights and interests of navigation and fishing; and he avers that he has been inform-



ed that the said Railroad company have not obtained any assignment of the said lease to said Cofield, or acquired title to the same; and he positively charges that they do not own a fee simple of the land from which they are constructing the said wharf, but that the same is vested wholly in your orator; and he shows and avers, that if said Railroad company were seized in fee of said land, they would not be authorized to construct a wharf interfering with the fishing or navigation of said waters; both of which your orator charges will be seriously obstructed if the said company are permitted to erect the wharf which their agents are now employed about.

Your orator further shows and avers, that the said wharf will extend across about one half the said haul of his seine from his aforesaid fishery, and render it impracticable to fish the same as heretofore, and that it not only obstructs his seine, but will wholly destroy his said fishery; and he is advised that the said haul appurtenant to said fishery so as aforesaid possessed and enjoyed for upwards of twenty years, is a valuable right indefeasibly vested in him, and defined and protected by law, and which the said Railroad company have no authority to impair or injure; and your orator believes, and charges, that the said fishery, which the erection of said wharf will utterly ruin and destroy, is worth a large sum, to wit, fifteen thousand dollars.

Your orator further shows and avers, that he owns several other valuable fisheries a short distance below the before mentioned fishery, which, with the hauls respectively attached to them, have been possessed, used, and enjoyed by your orator, and those under whom he claims, for upwards of twenty years; and he believes and charges that the erection of said wharf will tend greatly to injure, if no entirely destroy them.

That the great quantity of sediment and other deposit which will lodge and accumulate about said wharf, and gradually spread itself and settle for a considerable distance along said shore, will, as your orator believes and charges, and as experience has shewn in several instances of the obstructions in said river, fill up and ultimately render the whole shore, now owned and used for fishing by your orator, a flat of mud and other deposits unfit for fishing and valueless.

And he further shews and avers that the water which covers the haul of his several fisheries has been from time to time, by the proprietors thereof, cleared of obstructions at great cost and expense in order to improve the fisheries, and that there is such a quantity of logs, timber, boards, and other substances annually drifted down the Susquehanna by its sudden and rapid freshets, and of mud and other deposit removed and shifted from place to place by the power of the current, as to subject your orator and other owners of fisheries very frequently to considerable annual expense in clearing out their respective hauls; but if a permanent fixture, such as said wharf which for the distance of upwards of six hundred feet into the said river is being constructed, by throwing loose and shifting earth and stone in, large portions of which are instantly hasted into his said hauls, is to be permitted, and

which for the distance of several hundred feet more, and across the channel too, is to be constructed by driving down piles of timber admirably adapted to catch the loose trees and logs floating on the surface, and the shifting sediment and mud, and sweep them into the eddy below the wharf, embracing nearly the whole fishing ground of your orator, where for the want of sufficient current they must sink and remain, then all the fisheries and shore adapted to fishing of your orator will be ultimately destroyed; and your orator shows that his said fisheries and shore adapted to fishing is of great value, to wit, sixty thousand dollars, and that if the same is not entirely destroyed, it will be very much injured and depreciated in value by the erection of said wharf.

Your orator further shows that the said Railroad company have given out and declared that they intend to ply a steam ferry boat across said river from the said wharf to the Harford shore, and he believes and avers that the use of a steam boat in crossing said river will greatly injure and interfere with his said fisheries, and others on said river.

That even if it were practicable, but which it is not, to haul his seine outside of said wharf from his fishery nearest to the same, the use of such a boat, owing to the frequency of its crossing, would intercept and prevent his doing so. And your orator believes and charges that the plying of a steamboat across said river as a ferry boat will, by causing and keeping the water agitated, together with the noise of emitting the steam, frighten away the fish which now frequent the Susquehanna river, and not only break up and ruin the fisheries, but greatly diminish the quantity of fish by preventing their ascending the river to the falls where they spawn. And he further shews that the said railroad have no authority to ply a ferry boat across said river, or to erect a wharf with that view; and that if they have a right to establish a ferry, they possess no power to use and employ vessels which will prejudice or ruin the adjacent fisheries.

And your orator charges that the wharf which said Railroad company is constructing, being in fact a bridge under the misnomer of a wharf, extending more than half the distance across the eastern branch of the Susquehanna, is not necessary or indispensable for any legitimate purpose within the charter powers of said company, but is a device and invention of the agents of said company to narrow the passage across said river without authority, and to the great injury of your orator and the public; and in illustration thereof he shews that, for upwards of twenty years, a ferry has been kept across said river near where said company are constructing said wharf; and that he has had the wharf of said ferry located, which will be seen on said plat, at the west corner of the lot leased to Coffield, and he charges that the water at said wharf has been sufficient to admit of the easy and safe approach of a large ferry boat, by means of which all the travel on that public mail route between the cities of Philadelphia and Baltimore has been readily accommodated, and that said wharf does not extend more than about one eighth part of the distance from the shore, that the said wharf which said Railroad company is erecting does; and that if the only

object of said company was to construct a wharf to ferry from, it is manifest that there would be less necessity to extend it so far into the river as they contemplate and are engaged in doing. And your orator further submits, that if authority to erect a wharf or employ steamboats has been conferred on said Railroad company, it was never intended that they should exercise it so as to interfere with the paramount interests of general navigation or of fishery, and that any grant destructive of these great public rights would be void.

Your orator further shows, that if the said Railroad company have authority to construct said wharf, and to ply a steam ferry boat across said river, which he protests they have not, they are liable to him in damages for the great injury which he will sustain, and he is advised that this honorable court can entertain jurisdiction of the whole subject, and by final decree award him compensation for the loss and ruin of his fisheries and shore adapted to and capable of being used as fisheries.

Inasmuch, therefore, as your orator is remediless in the premises, except by the interposition of a court of chancery, where matters of this character are peculiarly cognizable and relievable, and to the end that his valuable property and rights may be protected from utter ruin by the unlawful acts of the said company, may it please your honor to grant unto him the State of Maryland's writ of injunction, to be directed to the said Delaware and Maryland Railroad Company, its president and directors, agents and servants, commanding and enjoining them, and each and every of them, forthwith to forbear, desist, surcease, and refrain, absolutely and altogether, from making, constructing, or completing the said wharf, contemplated and laid out by them, from the lot leased by the father of your orator, hereinbefore mentioned, to Coffield, on the Susquehanna river, and from all and every act whatsoever towards the making, completing, or using in any manner the said wharf, or any part thereof, and from placing any stone, gravel, earth, logs, timber, board, or any other substance or material on said wharf, or any part thereof, or on the said river, and from driving down piles or timbers in said river, and from every other and further act touching or affecting the said wharf commenced by them from the Cecil shore of the Susquehanna river, until the further order of your honor; and that your honor would be further pleased to grant unto your orator a summons, to be directed to the said Railroad company, and the State's writ of subpœna to be directed to James Canby, its president, and to Matthew Newkirk and David Wilson, directors of said company, the other directors of said company being unknown to this complainant, commanding said Railroad company under its corporate seal, and the said James Canby, president, and the said Matthew Newkirk and David Wilson, directors, as aforesaid, upon their corporal oaths, respectively, to answer this bill, and all and singular the matters and things herein set forth, and as fully, distinctly, and perfectly, in every respect, as if they were herein again severally and specially interrogated of and concerning the same; and that your honor would be pleased, by final decree in the premises, perpetually to enjoin said Railroad company,

as hereinbefore prayed in respect to said wharf, and from plying across said river any steam vessel as a ferry boat; and that they may be decreed to remove the said wharf and every part thereof, and abate every obstruction and deposite of any stone, timber, or earth made in said river, and adjudged to pay and satisfy to your orator full compensation for the injury done to his fisheries and shore. And that your orator may have adequate and general relief in and touching the premises.

And he will ever pray, &c.

ALBERT CONSTABLE,
HENRY STUMP,
Solicitors for Complainant.

CITY OF BALTIMORE, *set:*

On this 5th day of September, eighteen hundred and thirty-six, before the subscriber, a justice of the peace in and for said city, personally appeared the within named complainant, John Stump, who made oath, that all and singular the matters and things stated in the foregoing bill, as of his personal knowledge, are true, and that all else therein contained he believes to be true.

Sworn before THOS. B. POTTINGER.

(*Exhibit B.*)

Exhibit B, referred to in the bill.

These are to certify, that on the 8th of August, 1836, I made a survey for Mr. John Stump, of Cecil county, and State of Maryland, of that part of the shore of the Susquehanna river which extends from the lower ferry to the lower capstain of said Stump's middle fishery in said county, and have delineated the same on the plot appertaining hereto, with other matter hereinafter described. Beginning for the survey at the southwest corner of the ferry tavern-house, at the place designated on the plot by the small black letter Q; thence running south fifty-four degrees west, four perches; south twenty-eight degrees west, three perches, to the former wharf of said ferry; then along the same south sixty-one degrees west, two and a-half perches; south twenty-five degrees east, one and a-half perches; north sixty-two and a-half degrees east, two and a-half perches; then south twenty-four degrees east, two and a-half perches, to the wharf at present occupied as the ferry; and along the same the four following lines: south seventy-nine degrees west, six and four-tenths perches; south twenty-six degrees east, three and seven-tenths perches; north sixty-four degrees east, six and six-tenths perches; north sixty-one degrees east, four perches; then down the shore of said river the following lines: south twenty-four degrees east, twelve and three-tenths perches; south twenty-five degrees east, ten perches; south forty-five and a quarter degrees east, sixteen perches; south sixty-two degrees east, five and a-half perches; south forty-five degrees east, seven perches; south twenty-six and a quarter degrees east, two perches, to the upper capstain of said Stump's upper fishery; then

the same course five perches; south twenty-eight degrees east, twenty-three perches, to the second capstain of the same fishery; south twenty-two degrees east, twenty-three perches, to the lower capstain of the same fishery, near the lower end of the upper fish-house; south thirty-four degrees east, thirty perches; south forty-four and three-quarters degrees east, twenty-six perches; south fifty degrees east, twenty-four perches, to the snatch block of the middle fishery of said Stump; then the same course seventeen perches, to the upper capstain of said middle fishery; then the same course seven perches; south fifty-three degrees east, fourteen perches, to the shad-house of said middle fishery, and opposite the fish-house of the same, south four and a-half degrees east, eight perches, to the lower capstain of said middle fishery, at the place designated by the small letter W. Also I have laid down the ferry-wharf, ferry-house, and the public road; also the lot of land belonging to Coffield, and the centre of the contemplated railroad, as the same is marked out, which is represented by the black dotted line extending from the place represented by the large black letter D, to that by E and F; the bearing of which line is S. 70 W., at E, and S. 71 W., at F, and extends twenty-nine perches, through the land of said Coffield; and the same line extended as the centre of the contemplated wharf of the railroad to the place designated by the large black letter A, in the Susquehanna river, which is forty-nine perches distant from the shore by that line or course; and the same line extended intersects a bar in said river; the place of which intersection is designated by the large black letter B; at which place the depth of the water at low tide was eight feet; and at A, at low tide, the depth was found to be fourteen feet and nine inches; and the distance from the shore by the same line extended, is ninety-four perches. Those distances were ascertained by trigonometrical calculation, founded on the courses last mentioned, to wit, the S. 71 W., as the position at E, where that was taken, seemed to be clearer of local attraction than the one at F, which gave S. 70 W. The bar in said river extends from the southern end of Watson's island, to the place represented by the large black letter B; and below it, increasing in height as it approaches the island, the depth of water at the bar, measured at low tide at the place represented by the black letter B, was found to be eight feet, between which position, and the end of the contemplated wharf, there is deep water, known as the eastern channel. The deep water also extends twelve and a-half perches from the place represented by A to that of S; between which place, and the river shore on the Cecil side, are the flats; at another position the depth was ascertained to be three feet two inches; which position is marked by the large black letter G. I have laid down the bar in the river, as the same extends from Watson's island southwardly, not by measurement of any kind, but as the same appears by observation. I have also ascertained the distance across the Susquehanna from intersection of the contemplated railroad with the shore of that river, at the place designated by the black letter F, in the direction of the said railroad, to the place on the Hartford side of the river,

at the place designated by the large black letter H; the distance on said line bearing S. 70 W., at F, and south 71 W., at E, is found by calculation to be two hundred and forty-three perches.

Also I have ascertained the distance across the Susquehanna from the snatch block on the Cecil shore, a course bearing south forty-eight degrees west, to the light-house, I ascertained by trigonometrical calculation to be two hundred and eighty-eight perches.

Also I have surveyed and laid upon the plot the lot of land belonging to Coffield. Beginning for the same at a position in front of the garden of the ferry tavern, on the south side of the public road, and running along the same north sixty-one and three-quarters degrees east, twenty-four perches, to the place designated on the plot by the large black letter C; then south twenty-seven and a quarter degrees east, thirty perches; south twenty-six and a quarter degrees east, sixteen and a half perches; sixty-two and three-quarters degrees west, twenty-three perches; north sixty-two degrees west, five and a half perches; north forty-five and a quarter degrees west, sixteen perches; north twenty five degrees west, ten perches; north twenty-four degrees west, twelve and three-tenths perches, and by a right line to the place of beginning; which survey was made by the holdings on the east and south sides, the Susquehanna river on the west, and the public road on the north.

The distance from the south side of the above described lot at the river shore to the upper capstain of the upper fishery of John Stump, is nine perches; the distance to the second capstain is twenty-eight perches from the first; and the lower capstain of the upper fishing shore is twenty-three perches distant from the second; the distance from the lower capstain of the upper fishing shore to the snatch block of the lower fishery is eighty perches, which is seventeen perches distant from the upper capstain of the middle fishery of said Stump; the lower capstain of the middle fishery is twenty-nine perches distant from the upper capstain of the same. The distance from the lower capstain of the upper fishery to the upper capstain of the middle fishery is ninety-seven perches.

HENRY HOLLINGSWORTH,
Surveyor.

MARYLAND, *Cecil county, to wit:*

On the 16th August, 1836, came Henry Hollingsworth, surveyor of Cecil county, before the subscriber, a justice of the peace of the State of Maryland in and for Cecil county, and made oath on the holy evangely of Almighty God to the truth of the foregoing certificate.

HENRY HOLLINGSWORTH.

Sworn and subscribed before

JOHN A. RANKIN.

STATE OF MARYLAND, *Cecil county, sct.*

I hereby certify that John A. Rankin, esq., before whom the within affidavit was made, and whose name is thereto subscribed, is one of the State of Maryland's justices of the peace, in and for Cecil county afore-

1540.

said, duly commissioned, qualified, and sworn according to law, to all whose acts as such full faith and credit is and ought to be given, as well in courts of justice as thereout.

In testimony whereof I have hereto subscribed my name and affixed the seal of my office, this 16th day of August, A. D. 1836.

[SEAL.] JAMES SEWALL,
Clerk Cecil county court.

On which bill the chancellor passed the following order:

Order to issue subpœna and injunction.

In chancery, 13th September, 1836.

Ordered, that writs of subpœna and injunction issue as prayed by the foregoing bill of complaint; and it is further ordered, that at any time after the said defendants have filed their answers, the court will hear a motion to dissolve the said injunction, provided the said defendants give to the said plaintiff, or his solicitor, ten days' notice thereof, and the register is directed to endorse a copy of this order on the said writ of injunction, that it may be served therewith on the said defendants.

THEODORICK BLAND, Ch.

And thereupon writs of subpœna and injunction were issued accordingly, returnable to the next term of the said court. At which next term, to wit, September term of the said court, in the said year, 1836, came the said defendants, the president and directors of the Delaware and Maryland Railroad Company, by Otho Scott and John C. Groome, esq., their solicitors, and appeared to the said bill, and filed in said cause their answer to the said bill in the words following, to wit:

Answer of the Wilmington and Susquehanna Railroad Co.

The answer of the Wilmington and Susquehanna Railroad Company, sued by the name of the Delaware and Maryland Railroad Company, to the bill of complaint of John Stump, of Cecil county.

This defendant, now and at all times hereafter, saving and reserving to itself all and all manner of benefit and advantage of exception to the said bill of complaint, and the manifold errors, insufficiencies, misrepresentations, uncertainties, and other imperfections therein contained, for answer thereto, or to as much thereof as this defendant is advised it is material or necessary to make answer unto, for answer saith:

That this defendant was incorporated by an act of the legislature of this State, and was duly authorized by the act of incorporation and the supplements thereto, to construct a railroad from the dividing line between the States of Delaware and Maryland, to some point on the Susquehanna river, and further authorized and empowered to erect all needful buildings, wharves, warehouses, and other edifices requisite for the business of said company; and also to establish a line of steamboats between the cities of Baltimore and Philadelphia in connexion with

said railroad; all which will appear by reference to the said act of incorporation, passed at December session, 1831, chapter 296, and the supplement thereto, passed at December session, 1834, chapter 281.

That this defendant, in pursuance of the powers conferred upon it by the said acts of incorporation, has commenced the construction of a railroad from the Maryland and Delaware line, to the point on the Susquehanna river designated by the complainant in said bill of complaint. And this defendant, in further pursuance of the powers vested in it by its charter, has commenced the erection of a wharf on said river designated by said complainant in said bill of complaint. But this defendant expressly denies that the said wharf is unnecessarily extended into said river; on the contrary, the said wharf is constructed so as to terminate at the nearest point to the shore of the said river where the water is of sufficient depth at low tides to admit of the approach of a steamboat of the ordinary size and construction. This defendant further answering states, that it has made arrangements to obtain the right of way to the water of said river from the persons having a term, for ninety-nine years, with a covenant of renewal forever, in the lands over which said railroad passes, and in virtue of the right derived from such owner of the term in said lands have a right to construct a railroad thereon.

That the said wharf, which is in the course of construction, connects with the railroad made over said leasehold property, but is not made within the lines of the lands of said complainant, or any other proprietor. That this defendant is informed and believes that the said complainant is the owner of fisheries situate some distance below the said wharf, but so far as this defendant is informed, the said wharf cannot cause very material injury to said fisheries. They are situated so far below said wharf, and the wharf being so near the line of a long established ferry where a seine could not have been hauled, it would seem that the injury to said fisheries is merely imaginary. This defendant does not admit that any consequential injury would result to said complainant by any deposit of mineral matter. That it is advised and believes that the said wharf would not occasion any deposit of earth or drift timber in that part of said river which the complainant alleges would be affected in that way.

This defendant, in relation to the rights of fishery claimed by said complainant, would beg leave to state, that it is advised that the said complainant is not entitled, except in common with all other citizens, to haul a seine in that part of said river not immediately contiguous to that part of the shore of said river of which he is the owner and proprietor, and it will be perceived that no part of said wharf is placed in the river opposite the fishing places claimed by said complainant.

This defendant admits that it designs to use a steamboat in connexion with said railroad, and alleges that said wharf is being erected for the purpose of enabling it to use said steamboat, and it is contended by this defendant that it has a clear right, expressly given by its charter, to use a steamboat, and would state, that without the use of a steamboat

the railroad would be useless. The object and design of said railroad, as will be seen by reference to the charter, is to transport passengers and merchandise between the cities of Baltimore and Philadelphia; and that in order to complete the transportation between said cities, steamboats in connexion with said railroad is indispensably necessary.

This defendant, in answer to all that part of said complainant's allegations that the said wharf is unnecessarily extended for the purpose of lessening the distance across the said river, states that the wharf is not extended for any such purpose, but is extended for the sole purpose of getting a sufficient depth of water to admit of the approach of the steamboat to be connected with said railroad; and this defendant would remark, that if the ferryboat now in use can approach nearer to the river shore than the termination of said wharf, that it furnishes no ground to infer that said wharf is unnecessarily extended, because the ferry boat now used is a scow, drawing only a few inches of water, and the steamboat which this defendant contemplates using, and without which the said railroad would not answer the design of construction, will draw from five to six feet water.

This defendant denies that the said wharf will in any degree injure the navigation of said river; but on the contrary, if the navigation is affected at all by said wharf, it will be facilitated.

That the injury resulting from the frightening of the fish from the places where the spawn and breed their young, if any such injury shall be committed, it is one for which the complainant, as this defendant apprehends, has no right to claim damages.

This defendant denies that the steamboat intended to be run from said wharf is designed to be a ferry boat in the ordinary sense. The whole use of such steamboat will be to transport the passengers and the merchandise carried upon said railroad over said river, and not to take all persons and passengers who may desire to cross said river as ordinary ferry boats do.

This defendant also denies that the steamboat designed to be used is made unnecessarily large, or to draw more water than is needful; but states that the boat intended to be used is such a one as by its charter it is empowered to use; and further, that any less boat would not enable this defendant to transport the passengers and merchandise carried on said railroad. That in fact the steamboat, as well as the wharf, is just such as, according to the judgment of skilful engineers in the employment this defendant, were necessary for the convenience and and free use of said railroad.

This defendant further answering begs leave to state, that it is informed and believes that if some slight injury should be done to the fisheries of said complainant, (which is by no means admitted,) that the said complainant would not be entitled to claim damages therefor. That if any such injury is done, it results from the use of said river for purposes of navigation by this defendant authorized by its charter. That the common right of fishing in said river cannot give those disposed to exercise

it, a right to restrain this defendant from navigating said river with such boats as are manifestly contemplated by its charter, and which are indispensable to attaining the object of said company. That the object of laying out seines in an oblique direction from the fishing shores cannot give those who do so any several right of fishery in the water in which they lay their seines. The said river is a public navigable river in which all have a common right to fish, subject to the paramount right of navigation.

That this defendant has express power to erect all needful wharfs, and the aforesaid wharf, as is before stated, is needful; that it is not erected where the complainant has any right of soil, and is an erection without which the large sums expended by this defendant in the construction of said railroad would be lost, by the said road being utterly useless.

All of which this defendant is ready to verify and prove as this honorable court may direct; without this, that there is any matter or thing in the said bill of complaint alleged not herein answered, traversed or denied, that is true.

Wherefore this defendant prays that the injunction heretofore granted in the premises may be dissolved, and this defendant dismissed with its reasonable costs and charges in this behalf most wrongfully sustained, and so forth.

In verification of the aforegoing answer, the said defendant hath hereto affixed its corporate seal this 29th day of September, 1836.

[Corporate seal.]

OTHO SCOTT &
J. C. GROOME,
Solicitors for defendant.

And at the same time the said defendants filed in the cause a petition in the words following:

Petition for hearing motion to dissolve injunction.

To the honorable Theodorick Bland, chancellor of Maryland.

The petition of the Wilmington and Susquehanna Railroad Company humbly shows to your honor, that one John Stump, of Cecil county, hath exhibited his bill of complaint to your honor, alleging that this defendant, by the name of the Delaware and Maryland Railroad Company, (the name of this corporation being changed by act of the legislature of this State passed at its last session, and the said Stump having sued by the former name of this petition,) was erecting a wharf in the river Susquehanna, in Cecil county, and that this defendant designed running a steamboat from such wharf, and that such wharf was extended unnecessarily a great distance into said river, and that the steamboat to be used was not authorized by the charter of this petitioner. That great injury was done to the fisheries of said Stump by said wharf and steamboat, and that the navigation of said river was prejudiced by said wharf; praying your honor to issue an injunction re-

straining the erection of said wharf; all which will more fully appear by reference to the said bill of complaint now remaining in the court of your honor.

This petitioner further states, that upon the said bill of complaint your honor issued an injunction, commanding this petitioner, by the name of the Delaware and Maryland Railroad Company, to cease from further erecting said wharf.

This petitioner states, that the said wharf is an erection which it is authorized to make by its charter, and that the same is absolutely necessary to carry on the business of this petitioner.

That it has not extended said wharf further into said river than is necessary to reach a sufficient depth of water to enable such a steamboat to approach as it will be necessary for this petitioner to use in connexion with the said railroad.

That this petitioner has answered said bill of complaint, denying all the material allegations therein, as will be seen by the answer of this petitioner herewith filed.

Your petitioner further states that the said wharf, from the erection of which your petitioner was enjoined, is a work of vast expense; and that at the time the said injunction was issued this petitioner had about one hundred and twenty men employed in the erection and building of said wharf. That the work has been done to considerable extent, but is not so far completed as to protect and secure what is done from the floods and ice. That by means of the said injunction the men to the number aforesaid are thrown out of employment, to the great injury of this petitioner, and the work is left in a situation to be injured to an immense amount by its being unprotected from the action of the floods and ice. And your petitioner further states, that the season is so far advanced that if your petitioner is delayed in the prosecution of said work for any considerable length of time, it will be impracticable to secure the work from the floods and ice during the coming winter, as will be seen by an affidavit of the engineer herewith shown, and marked A.

Your petitioner therefore prays that your honor will order a hearing on a motion to dissolve said injunction at an early day, and that to prevent the great loss occasioned to your petitioner by delaying the work aforesaid, and the deferring of employment to the workmen aforesaid, your honor will suspend the said injunction till the motion aforesaid can be heard; and that until a hearing can be had, *that* your petitioner may be permitted to proceed with said work.

And your petitioner will ever pray, &c.

OTHO SCOTT,
J. C. GROOME,
Solicitors for petitioner.

HARFORD COUNTY, *to wit:*

On this 29th day of September, 1836, came James Canby, president of the Wilmington and Susquehanna Railroad Company, before

me, the subscriber, a justice of the peace in and for said county, and solemnly declared and affirmed that the facts set forth in the aforegoing petition are true.

Affirmed before WM. P. SMITH.

Affidavit of J. P. Stabler, engineer.

Exhibit A, referred to in the petition.

MARYLAND, *Hartford county, sct.*

Be it remembered, that on this day of September, 1836, personally appeared James P. Stabler, chief engineer of the Wilmington and Susquehanna railroad, before me, the subscriber, a justice of the peace of the said State of Maryland, for Hartford county aforesaid, and solemnly, sincerely, and truly affirmed and declared that the wharf, which is now in progress of construction in the Susquehanna river, at the western extremity of the Wilmington and Susquehanna railroad, is not extended further in said river than in the judgment of of this affirmant, as such chief engineer, is absolutely necessary to admit the approach, at all tides, of such steamboats as it will be proper for the Wilmington and Susquehanna Railroad Company to employ in crossing said river; that the depth of said river, at the outer extremity of said wharf, does not exceed four feet at extreme low tide, and eight feet at mid-tide; that the whole length of the wharf, properly so called, is five hundred and sixty feet, and the length of the additional line of piers is one hundred and ninety-three feet more; that the said line of piers, at a platform on sundry piers, extending the said number of feet beyond the wharf (under which the waters of the river can freely flow) erected for the double purpose of subserving the convenience of passengers in entering and boarding said steamboats, and of protecting the said steamboats which will lie at the said wharf below the said piers or platform from the descending ice in the winter, besides affording the only means of securing or fastening the said steamboats while they lie at the said wharf.

And this affirmant further affirmed and declared, that it is essentially necessary that the said company should be permitted, without delay, to complete the said wharf and platform, and that the progress of the work should not be arrested, as thereby great damage and loss will be sustained by the said company, and perhaps the entire loss of all the work and labor that have been done in the said river by the said company, at a very heavy cost and expense.

Affirmed before, and certified by, WM. P. SMITH.

On which petition the Chancellor passed the following order:

The Chancellor conceives that the prayer of the aforegoing petition has been sufficiently provided for by the order of the 13th instant, and therefore it is ordered that the said petition be, and the same is hereby, dismissed with costs, to be taxed by the register.

THEODORICK BLAND, *Ch.*

And afterwards, at the same term, the sheriff of Cecil county made return of the said writ of subpœna, by him endorsed as follows: "summoned;" and at the said time the said sheriff made return of the aforesaid writ of injunction in the words following:

MARYLAND, *set.*

The State of Maryland to the Delaware and Maryland Railroad Company, its president and directors, agents and servants, of Cecil county, greeting:

Injunction.

Whereas John Stump hath exhibited to us in our court of chancery, his bill of complaint against you, the said Delaware and Ma-
[SEAL.] ryland Railroad Company for relief in equity, and to prohibit and enjoin you, the said Delaware and Maryland Railroad Company, your president and directors, agents and servants, and each and every of you, to forbear, desist, surcease and refrain, absolutely and altogether, from making, constructing, or completing the wharf contemplated and laid out by you, the said Delaware and Maryland Railroad Company, from the lot leased by the father of the said complainant to Martha Coffield, on the Susquehanna river, and from all and every act whatsoever, towards the making, completing, or using in any manner the said wharf or any part thereof, and from placing any stone, gravel, earth, logs, timber, board, or any other substance or material on said wharf, or any part thereof, or in the said river, and from driving down piles or timbers in said river, and from every other and further act touching or affecting the said wharf commenced by you from the Cecil shore of the Susquehanna river, until the matter shall be heard in equity. We, therefore, do hereby command and strictly enjoin you, the said Delaware and Maryland Railroad Company, your president and directors, and agents and servants, that from henceforth you, and each and every of you, do absolutely forbear, desist, surcease, and refrain altogether from making, constructing, or completing the said wharf contemplated and laid out by you, the said Delaware and Maryland Railroad Company, from the lot leased by the father of the said complainant to the said Martha Coffield, on the Susquehanna river, and from all and every act whatsoever towards the making, completing, or using, in any manner, the said wharf or any part thereof, and from placing any stone, gravel, earth, logs, timber, boards, or any other substance or material on said wharf, or any part thereof, or in the said river, and from driving down piles or timber in said river, and from any other and further act touching or affecting the said wharf commenced by you from the Cecil shore of the Susquehanna river, until the further order of the court of chancery. Witness the honorable Theodorick Bland, esquire, chancellor, this 13th day of September, 1836.

Test: RAMSAY WATERS, *Reg. C. C.*

In chancery. 13th September, 1836.

Ordered, that writ of subpœna and injunction issue as prayed by the foregoing bill of complaint. And it is further ordered, that at any time after the said defendants have filed their answers, the court will hear a motion to dissolve the said injunction, provided the said defendants shall give to the said plaintiff or his solicitor ten days' notice thereof. And the register is directed to endorse a copy of this order on the said writ of injunction, that it may be served therewith on the said defendants.

THEODORICK BLAND, *Chr.*

True copy. Test. RAMSAY WATERS,
Reg. Cur. Con.

"Injoined." NOBLE PENNINGTON, *Sheriff.*
Return.

And afterwards, at the same term, the parties filed in the said cause an agreement in the words following, to wit:

JOHN STUMP
vs.
DELAWARE and Maryland Railroad Company. } In chancery.

Agreement.

It is agreed that the motion to dissolve the injunction in the above cause be heard on the 14th of October instant, and that complainant's solicitors have until the 19th to reply to defendants' solicitor.

HENRY STUMP,
ALBERT CONSTABLE,
Solicitors for complainant.
OTHO SCOTT,
J. C. GROOME,
For defendants.

Baltimore, October 13, 1836.

And afterwards, at the same term, the complainant filed in the cause his objections to a hearing of a motion to dissolve the injunction issued therein, and also certain exceptions to the answer of the defendants, in the words following:

Objection to hear the motion to dissolve the injunction and exceptions to the answer.

JOHN STUMP
vs.
DELAWARE and Maryland, alias the Wilmington and Susquehanna Railroad Company. } In chancery.

The complainant objects to the hearing of the motion to dissolve the injunction in this cause, until James Canby, David Wilson, and

1844.

Matthew Newkirk shall have answered the bill under oath; and the complainant shows the following causes of exception to the answer of the defendant, the Susquehanna and Wilmington Railroad Company:

1st. Because the said railroad company have not answered whether John Stump (the father of complainant) was not seized and possessed in fee simple, under grant by patent from the State of Maryland, of a valuable tract or parcel of land called "Perry Point," situate in Cecil county at the mouth of the Susquehanna river, and did not, upwards of twenty years since, establish certain fisheries on said property, and at which, by means of seines hauled over certain portions of said river, large quantities of shad and herring were annually taken.

2d. Whether the said John Stump did not, by his last will, duly executed to pass real estate, devise said estate, with all and singular its rights and advantages of fishery, to the complainant, and under which devise he entered into possession of said estate, and has always, since then, quietly and without any kind of interruption, held and enjoyed the same, together with all its rights and advantages of fishery, situate on said river as laid down and shown by a plat made by the surveyor of Cecil county.

3d. Whether, immediately below the lot of ground leased to Coffield, one of the fisheries of complainant is not situate, and whether the haul of the seine from which does not extend along and above the shore of said lot, and over to the bar making into said river from Watson's island, as designated by a circular line dotted with pencil on said plat, beginning at the number sixteen and extending round to the letter B; and whether the rapidity and strength of the current of said river does not prevent a seine being laid out and hauled from said fishery in any other direction than that of the said dotted pencil marks on said plat, and whether the complainant, and those under whom he claims, have not so used, possessed, and enjoyed said haul without interruption, and been always accustomed so to lay out their seines, for upwards of twenty years.

4th. Whether the contemplated wharf, and which said railroad company is employed in constructing, is not correctly designated on said plat by the lines drawn therein from F to A; and whether the river Susquehanna is not 243 perches wide at the point where the said wharf is to be erected, and 94 perches from the Cecil shore at said point to the opposite shore or bar formed in said river from the lower end of Watson's island; and whether said wharf is not located 49 perches into said river, and more than one-fifth of the whole width of said river, and exceeding half its width from the Cecil shore to the bar formed from the lower end of Watson's island.

5th. Whether said wharf will not encroach about 250 feet upon the channel of said river which flows between Watson's island and the Cecil shore, and extends that distance further than is necessary to admit of the safe and easy approach of any vessel navigating said river.

6th. Whether they have obtained any assignments of the lease to

said Coffield, or acquired title to the leasehold estate; and whether the complainant does not own the fee simple of the land from which they are constructing said wharf.

7th. Whether said wharf will not extend across about one-half of the said haul of the seine of complainant from his aforesaid fishery; and render it impracticable to fish the same as heretofore, and not only obstruct his seine but destroy his said fishery; and whether the said fishery is not worth fifteen thousand dollars.

8th. Whether the complainant does not own several other valuable fisheries a short distance below the before mentioned fishery, which with the hauls respectively attached to them have been used, possessed, and enjoyed by complainant, and those under whom he claims, for upwards of twenty years; and whether the erection of said wharf will not tend greatly to injure, if not entirely destroy, said fisheries; whether the great quantity of sediment and other deposit which will lodge and accumulate about said wharf, and gradually spread itself and settle for a considerable distance along said shore, will not, as experience has shewn in several instances of obstructions in said river, fill up, and ultimately render the whole shore, now owned and used for fishing by the complainant, a flat of mud and other deposit, unfit for fishing and valueless.

9th. Whether the water which covers the haul of his several fisheries has not been from time to time, by the several proprietors thereof, cleared of obstructions at great cost and expense in order to improve the fisheries; and whether there is not such a quantity of logs, boards, timber, and other substances, annually drifted down the Susquehanna by its sudden and rapid freshets, and of mud and other deposit removed and shifted from place to place by the power of the current, as to subject the complainant and other owners of fisheries very frequently to considerable annual expense in clearing out their respective hauls, and whether the said fisheries, and those adapted to fishing which the said wharf will destroy, is not worth sixty thousand dollars.

In all which particulars, and divers others, the said answer of the said defendant, the Susquehanna and Willmington Railroad Company is imperfect, insufficient and evasive; and the complainant therefore excepts thereto, and prays that the said defendant, the Wilmington and Susquehanna Railroad Company, may put in a full and perfect answer to all and singular the matters and things set forth and alleged in his said bill of complaint, and that an order may be made in the premises to that end by this honorable court.

ALBERT CONSTABLE,
HENRY STUMP,
Solicitors for complainant.

And afterwards, at the same term, the Chancellor passed in the said cause, at the foot of the foregoing bill of complaint, an order in the words following, to wit;

Order continuing the injunction, and exceptions set down for hearing 15th November, 1836.

In chancery, 20th October, 1836.

This cause standing according to the agreement filed on the 13th instant ready for hearing, on the motion to dissolve the injunction, the solicitors of the parties were fully heard, and the proceedings read and considered.

Whereupon it is ordered that the injunction heretofore granted in this cause be, and the same is hereby, continued until the final hearing or further order.

And it is further ordered that the exceptions filed by the plaintiff, on the 14th instant, to the answer of the defendant, the Wilmington and Susquehanna Railroad Company, after its solicitor had been heard on the motion to dissolve, stand for hearing on the 15th day of November next, provided that a copy of this order, together with a copy of the said exceptions, be served on the said body politic, or its solicitor, on or before the first day of November next.

THEODORICK BLAND, *Ch'r.*

And afterwards, at the same term, the defendant filed in this cause an order for an appeal, in the words following:

Order to enter appeal.

ELKTON, *October 22d*, 1836.

DEAR SIR: In the case of John Stump vs. the Delaware and Maryland Railroad Company, enter a prayer of appeal to the order granting the injunction, and also the order overruling the motion to dissolve.

Yours, OTHO SCOTT,
J. C. GROOME,
Sol'rs for defendant.

To RAMSAY WATERS, esq.

And the said appeal was granted, and the proceedings ordered to be transmitted, and the same were transmitted accordingly.

And afterwards, to wit, on the 3d day of March, 1837, there was filed in the said cause a copy of the decree of the court of appeals in the words following, to wit:

In the court of appeals for the Western shore, Dec. term, 1836,

THE DELAWARE AND MARYLAND RAILROAD COMPANY
vs.
JOHN STUMP.

This cause coming on for hearing was argued, and the proceedings were by the court read and considered.

Decree of the court of appeals.

Whereupon it is this 11th day of February, in the year 1837, by the court of appeals, adjudged, ordered, and decreed, the order granting the injunction, and the order of the Chancellor refusing to dissolve the same, be, and they are hereby, reversed and annulled; and that said injunction be, and the same is hereby, dissolved, and that the cause be remanded to the court of chancery; and it is further adjudged, ordered, and decreed, that the appellee pay the appellant the said appellant's costs in this court, and those incurred in the court of chancery in and about this appeal.

JOHN BUCHANAN,
THOS. B. DORSEY,
E. F. CHAMBERS,
ASA SPENCE.

MARYLAND, *sct.*

I, Richard W. Gill, clerk of the court of appeals for the Western shore of the State of Maryland, do hereby certify, that the preceding is a full and true copy of the decree of which it purports to be a copy.

In testimony whereof I have hereunto set my hand, and affixed the seal of the said court of appeals, this 3d day of March, 1837.

[SEAL.] Test: RICHARD W. GILL,

Clerk court of appeals, Western shore, State of Maryland.

And afterwards, to wit, on the 9th day of December, 1837, the solicitors of the complainant caused to be entered on the docket of the court a general replication to the answer of the defendant filed in the said cause; and at the same time the parties aforesaid, by their solicitors aforesaid, filed an agreement in said cause in the words following, to wit:

In chancery, remanded from the court of appeals.

JOHN STUMP
vs.
DELAWARE and Maryland Railroad Company.

The register will please issue commission in this cause to take testimony, directed to Augustus Miller, esq., Elkton, Md.; Otho Scott, esq., of counsel for the company, is now at Annapolis, and will no doubt consent.

ALBERT CONSTABLE,
HENRY STUMP,
Solicitors for complainant,
OTHO SCOTT,
For Defendant.

Dec. 7th, 1837.

And thereupon a commission was accordingly issued in the usual form to Augustus Miller, of Cecil county, to take testimony in the said cause.

MARYLAND, *sct.*

I hereby certify, that the aforegoing is a full and true copy of the original proceedings in the said cause now remaining in the court of chancery of the State of Maryland.

In testimony whereof I have hereto set my hand, and affixed the [SEAL.] great seal of the said State, this 9th day of November, 1850.

LOUIS GASSAWAY,
Reg. Cur. Con.

And the following inquisition:

Inquisition.

STATE OF MARYLAND,
Cecil county, sct.

To Noble Pennington, esquire, sheriff of Cecil county.

Whereas application hath this day been made to me, the subscriber, one of the justices of the peace of the said State, for Cecil county aforesaid, by the Wilmington and Susquehanna Railroad Company, formerly called the Delaware and Maryland Railroad Company, by John C. Groome, their attorney, for a warrant under my hand and seal, to be to you directed, requiring you to summon a jury to value the damages which the owner or owners of a lot or parcel of land, being part of a tract of land called "Perry Point," (which lieth on the south side of the post road leading from the lower ferry on the Susquehanna river to Charlestown, in Cecil county aforesaid, and which is particularly described by courses and distances in a certain indenture or lease, from one John Stump to Martha Coffield, bearing date on or about the second day of March, in the year one thousand eight hundred and eleven, duly acknowledged and recorded in liber J. S., No. 7, folio 291, &c., one of the land record books of said county,) now in the possession of William Coffield and Elizabeth A. Coffield, his wife, and said to be owned by the said Elizabeth A. Coffield, formerly Elizabeth A. Dutton, as the devisee or legatee of the said Martha Coffield, on lease for years, with reversion to one John Stump, son and devisee of the aforesaid John Stump—will sustain by the use or occupation of such part thereof by the said company as may be by them required, pursuant to the provisions of the act of assembly passed at December session, in the year one thousand and thirty-one, chapter 296, entitled an act to incorporate the Delaware and Maryland Railroad Company. These are therefore to authorize and require you to summon in the manner prescribed by the said act, a jury of twenty inhabitants of Cecil county aforesaid, not related nor in anywise interested, to meet on the part of the said lot or parcel of land, to be valued on Friday the thirtieth day of (September)

this current month; of whom the twelve that may remain, after four jurors have been struck off by each party, in conformity with said act, shall act as the jury of inquest of damages to value the damages which the owner or owners of the said lot or parcel of land will sustain by the use and occupation of such part thereof by the said company as may be by them used, occupied, or required; and for so doing this shall be your sufficient warrant.

Given under my hand and seal this nineteenth day of September, in the year one thousand eight hundred and thirty-six.

JOHN A. RANKIN. [SEAL.]

An inquisition taken on the lands and premises hereinafter mentioned and described, situate, lying, and being in Cecil county, on this thirtieth day of September, in the year of our Lord one thousand eight hundred and thirty-six, before Noble Pennington, esquire, sheriff of said county, by virtue of the warrant hereto annexed by John A. Rankin, esquire, a justice of the peace of said county, and to the said sheriff directed, by the oaths of Henry H. Gilpin, Thomas Bouldin, Richard Bouldin, David Taylor, Benjamin Bowen, John Bouchell, Lawrence Simmons, Matthew Weir, Daniel McCauley, Noble Biddle, William Taylor, and Thomas McCreary, inhabitants of said county, not related nor in any wise interested, who say that the land and premises owned or claimed, or claimed to be owned, by Elizabeth A. Coffield, the wife of William Coffield, as the legatee under the last will and testament of Martha Coffield, deceased, by a certain lease executed by John Stump, deceased, to the said Martha Coffield, for a term of ninety-nine years, with covenants of renewal forever, and hereinafter valued for the Wilmington and Susquehanna Railroad Company, are contained within the following courses and distances, that is to say: Beginning at a point in the division line between the lands and premises of the said William Coffield and Elizabeth Coffield, his wife, and a lot of ground belonging to Messrs. Stockton and Stokes; which point is about twenty-five perches distant from the post road leading from Charlestown to the lower ferry, opposite to the town of Havre de Grace, and running thence with the said division line, north twenty-six and a half degrees west, two hundred and two feet; thence south sixty-eight and a half degrees west, eight hundred and twenty-two feet, to the Susquehanna river; thence by and with, and bounding on, said river south twenty-five degrees east, two hundred and one feet; thence with a straight line to the place of beginning, containing three acres and four-tenths of an acre, be the same more or less. And the jurors aforesaid by their oaths aforesaid also say, that they value the said lands and premises so as aforesaid described, and all the damages which are and will be sustained by the said William Coffield and Elizabeth A. Coffield, his wife, and by every and all other owner or owners thereof, by, through, or under them, or either of them, or by, through, or under the said Martha Coffield (be they whosoever they may) by the use and occupation of the same by the said Wilmington and Susquehanna Railroad Com-

pany (taking into the estimate the benefits resulting to said owner or owners from conducting the said railroad through the lands and property of said owner or owners thereof) at the sum of forty-one hundred dollars current money.

And the jurors aforesaid, by their oaths aforesaid, further say, that the quantity of duration of interest in the said described lands and premises, so valued for the said Wilmington and Susquehanna Railroad Company, shall be an estate for a term of ninety-nine years, ending on or about the first day of March, in the year one thousand nine hundred and ten, fully to be complete and ended, renewable forever in the same manner and with the same covenants as the said described lands and premises have been held and enjoyed by the said Martha Coffield, and those claiming under her, except the covenant for the payment of the yearly rent or sum of one hundred dollars, mentioned in the aforesaid lease from the said John Stump to the said Martha Coffield.

In witness whereof the jurors aforesaid have hereunto respectively signed their names, and affixed their seals respectively, on the day and year aforesaid, and at the place hereinbefore written.

HENRY H. GILPIN, [SEAL.]
THOMAS BOULDIN, [SEAL.]
RICHARD B. BOULDIN, [SEAL.]
DAVID TAYLOR, [SEAL.]
BENJAMIN BOWEN, [SEAL.]
JOHN BOUCHELL, [SEAL.]
LAURENCE SIMMONS, [SEAL.]
NOBLE BIDDLE, [SEAL.]
WILLIAM TAYLOR, [SEAL.]
MATTHEW WEIR, [SEAL.]
DAN'L McCAULY, Jr., [SEAL.]
THOMAS McCRARY. [SEAL.]

Taken, signed, and sealed before and in the presence of—
NOBLE PENNINGTON,
Sheriff of Cecil county.

We hereby consent that the within inquisition shall be ratified and confirmed by Cecil county court, and we assign and transfer to Albert Constable the sum of four hundred dollars ($400) of the within, in consideration of his professional services.

WM. COFFIELD,
For self and Elizabeth A. Coffield.

Witness, 21st Oct., 1830.
ROBERT GALE.

To James Sewall, esquire, clerk of Cecil county court.

I do hereby certify, that in obedience to the warrant to which this return is annexed, I did, on the receipt thereof, summon a jury of twenty inhabitants of Cecil county, not related to the parties nor in any

wise interested, to meet on the land mentioned in the said warrant, on the thirtieth day of September last, the day named therein for the purposes specified in the same; that on said day the whole of said jurors, so as aforesaid summoned, did meet and were in attendance on the said lands, and the parties named in said warrant being present in person or by agent, each struck four of said jurors, thereby leaving Henry H. Gilpin, Thomas Bouldin, Richard Bouldin, David Taylor, Benjamin Bowen, John Bouchell, Laurence Simmons, Matthew Weir, Daniel McCauly, Noble Biddle, William Taylor, and Thomas McCreary, the remaining twelve of said jurors, to act as the jury of inquest of damages, who being by me severally qualified, agreeably to the act of assembly in such case made and provided, proceeded to view the premises, and to describe and ascertain the bounds thereof, the quantity and duration of interest in the same, and the damages, to be by them valued, and reduced their inquisition to writing, which was signed and sealed in my presence by each of the said twelve jurors above named, and was by me attested; and which, so signed, sealed, and attested, I now return to you, to be by you filed in your court, and when confirmed by said court, to be by you recorded according to law.

So answers NOBLE PENNINGTON,
Sheriff of Cecil county.

1836, Oct'r 21. Confirmed by Cecil county court.
Test: JAMES SEWALL,
Clerk Cecil co. court.

Record 21 Oct'r, 1836.

STATE OF MARYLAND, *Cecil county, sct.*

I hereby certify that the foregoing is a true copy taken from liber J. S., No. 38, folio 161, &c., one of the land record books of Cecil county aforesaid.

In testimony whereof I hereunto subscribe my name, and affix the [SEAL.] seal of Cecil county court, the eleventh day of November, in the year of our Lord one thousand eight hundred and fifty.

R. C. HOLLYDAY,
Clerk of Cecil county court.

Evidence of James Canby, witness for defendant.

The defendant then proved, by James Canby, that the paper referred to by the witness Low is not a copy of the paper which he, said Canby, had prepared for the signature of said plaintiff, and that it is not at all like it. The paper prepared by witness was simply a promise to resume work, and to take back the plaintiff's force; the course of witness was dictated by kindness and good feeling. The said witness also testified that his own motives, in declaring said contract forfeited, were honest and pure, and that the board was composed of gentlemen of the highest character, both in private life and in their business transactions.

The plaintiff thereupon offered in evidence, and read to the jury, the deposition of William P. Brobson, in the record of the case of S. & H. Howard against the defendant, in Cecil county court.

Record of Cecil county court.

MARYLAND, *Cecil county, to wit:*

At a county court, of the county and State aforesaid, in and for the second judicial district, begun and held at the court-house on the third Monday in October, (being the eighteenth day of the same month,) in the year of our Lord one thousand eight hundred and forty-one, were present the honorable E. F. Chambers, chief judge; J. B. Eccleston, P. H. Hopper, associate judges; Daniel McCauley, jr., esq., sheriff; James Sewall, clerk. In the record of proceedings of the same court, among other were the following, to wit:

SEBRE HOWARD & HIRAM HOWARD, trading under the firm of S. & H. Howard,
vs.
THE WILMINGTON AND SUSQUEHANNA Railroad Company.

Be it remembered that heretofore, to wit, on the twenty-first day of March, anno domini eighteen hundred and thirty-seven, Sebre Howard and Hiram Howard, trading under the firm of S. & H. Howard, by Amos T. Forwood, Albert Constable, and Richard C. Hollyday, esquires, their attorneys, prosecuted, and sued forth, out of the county court here, the writ of the State of Maryland of capias ad respondendum, against the Wilmington and Susquehanna Railroad Company, directed to the sheriff of Cecil county in form following, to wit:

Writ.

CECIL COUNTY, *ss:*

The State of Maryland to the sheriff of Cecil county, greeting:

You are hereby commanded to summon the Wilmington and Susquehanna Railroad Company, if they shall be found in your bailiwick, that they be and appear before Cecil county court, to be held at the court-house in Elkton, on the first Monday of April next, to answer unto Sebre Howard and Hiram Howard, trading under the name and firm of S. & H. Howard, in a plea of trespass on the case, &c. Hereof fail not at your peril, and have you then and there this writ.

[SEAL.]

Witness the honorable Ezekiel F. Chambers, chief judge of the said court, the twenty-seventh day of October, anno domini 1836.

Issued 21st March, 1837.

JAMES SEWALL, *Clerk.*

At which said first Monday of April, in the year 1837, comes into the county court here the said Sebre Howard and Hiram Howard, by their attorneys aforesaid; and the sheriff of Cecil county aforesaid, to whom the said foregoing writ was, in form aforesaid, directed, makes return thereof to the court here, thus endorsed, to wit:

Cepi corpora, James Sewall and James Canby; non sunt the others.
WM. McCULLOUGH, *Sheriff.*

Whereupon the said Wilmington and Susquehanna Railroad Company being called, appears in court here by John C. Groome and Otho Scott, esquires, their attorneys; whereupon, on motion of the said Wilmington and Susquehanna Railroad Company, by their attorneys aforesaid, it is ruled by the court here that the said Sebre Howard and Hiram Howard declare against the said Wilmington and Susquehanna Railroad Company in the plea aforesaid, or judgment by the court here will be rendered against them in default thereof.

Rule nar.

Whereupon the said Sebre Howard and Hiram Howard, by their attorneys aforesaid, pray leave of the court here to imparle until the third Monday of October next, and then to declare against the said Wilmington and Susquehanna Railroad Company in the plea aforesaid; and to them it is granted. The same day is given to the said Wilmington and Susquehanna Railroad Company also. And now here, at this day, to wit, the third Monday of October, in the year 1837, come again into the county court here as well the said Sebre Howard and Hiram Howard, by their attorneys aforesaid, as the said Wilmington and Susquehanna Railroad Company, by their attorneys aforesaid; whereupon, on motion of the said Wilmington and Susquehanna Railroad Company, by their attorneys aforesaid, it is further ruled by the court here that the said Sebre Howard and Hiram Howard declare against the said Wilmington and Susquehanna Railroad Company in the plea aforesaid, or judgment by the court here will be rendered against them in default thereof.

Whereupon the said Sebre Howard and Hiram Howard, by their attorneys aforesaid, pray leave of the court here further to imparle until the first Monday of April next, and then to declare against the said Wilmington and Susquehanna Railroad Company in the plea aforesaid, and to them it is granted; the same day is given to the said Wilmington and Susquehanna Railroad Company also. And now here, at this day, to wit, the first Monday of April, in the year 1838, come again into the county court here as well the said Sebre Howard and Hiram Howard, by their attorneys aforesaid, as the said Wilmington and Susquehanna Railroad Company, by their attorneys aforesaid. And the said Sebre Howard and Hiram Howard, by their attorneys aforesaid, declare against the said Wilmington and Susquehanna Railroad Company in the plea aforesaid in form following, to wit:

Nar.

STATE OF MARYLAND,
Cecil county, to wit:

The Wilmington and Susquehanna Railroad Company were summoned to answer unto Sebre Howard and Hiram Howard, trading under the firm of S. & H. Howard, in a plea of trespass on the case, &c. And whereupon the said Sebre Howard and Hiram Howard, trading under the firm of S. & H. Howard as aforesaid, by Albert Constable, and Reverdy Johnson and Henry Stump, esquires, their attorneys, complain, for that whereas the said plaintiffs heretofore were employed in executing work and labor upon railroads and canals as their proper business, trade, and vocation, and were possessed of all the requisite skill, industry, and experience, and of all the necessary means, laborers, engines, and implements, to enable them to complete and fulfil all their undertakings and contracts in a workmanlike manner, and in proper time; and whilst they were so possessed of the requisite means and skill, on the first day of October, in the year 1835, at Wilmington, that is to say, at Cecil county aforesaid, at the special instance and request of the defendants, they entered into and made with said Wilmington and Susquehanna Railroad Company, otherwise called the Delaware and Maryland Railroad Company, an agreement, or contract, to graduate all that portion of the Wilmington and Susquehanna railroad that lies between Charlestown and the Susquehanna river, for twenty-four cents per cubic yard, for common excavation; all rock at the estimate of the engineer. The plaintiffs to have the privilege of wasting the material of the cut and purchase ground to supply the embankment over Principio valley; the whole to be excavated in a workmanlike manner, and according to the directions of the engineer.

And the said plaintiffs aver, that in consideration of the aforesaid agreement, and for the purpose of being prepared and ready to execute the same, and at the special instance, and with the knowledge and under the assurance of the fulfilment of all the matters and things on the part of the said defendants to be fulfilled and kept, according to the true intent and meaning of the said agreement, the said plaintiffs did, after the making of said agreement, to wit, on the third day of October, in the year aforesaid, and upon divers other times and occasions, advertise, proclaim, and publicly declare, that they would employ and hire all such laborers, horses and carts, as should apply to, or be sent to them to be used or hired, for *for* fair and reasonable compensation, until the completion of the work on said railroad from Charlestown to the Susquehanna river. In consequence whereof, said plaintiffs were applied to by a great number of laborers and other persons to be hired, and said plaintiffs did engage, employ, hire, and pay a much greater number of laborers than they at that time had any need of, or could work to advantage on the other works they were then engaged in completing, for the purpose of retaining said laborers in their employment, with their carts, oxen, and horses, so that they could be

ready and prepared to commence, and vigorously prosecute to its completion, the graduation of the railroad aforesaid, contracted for between Charlestown and the Susquehanna river, as soon as the said company were ready for said plaintiffs to commence work upon it. And said plaintiffs say, that they also employed a number of boarding masters to board the laborers to be employed in working upon said railroad, many of whom purchased and laid in large supplies of food, bedding, and cooking utensils, and that they engaged the services of a number of managers to superintend the work of the laborers, all of whom were kept by said plaintiffs in a state of idleness and at great expense, until said company were ready for plaintiffs to commence work on the railroad between Charlestown and the Susquehanna river, according to the agreement aforesaid; and said plaintiffs also purchased a great number of implements and engines, and one hundred dozen shovels, for the purpose of fulfilling their agreement aforesaid; and were put to great expense, inconvenience, trouble, and delay, in and about satisfying, keeping, and compensating the laborers and other persons as aforesaid, whom they had engaged, retained, and hired, for the purpose of fulfilling their agreement as aforesaid. And said plaintiffs further declare, that in pursuance of said agreement, that a great number of the laborers they had engaged moved upon the line of the said railroad between Charlestown and the Susquehanna river, and there constructed their houses or shantees, to be ready to commence their labors on said road, according to the engagements they had entered into as aforesaid with said plaintiffs; and said plaintiffs moved and transported all their necessary engines, implements, machinery, stores, and other effects from the Baltimore and Port Deposit railroad to Frenchtown, in Cecil county, for the purpose of being ready to use them on that part of the railroad in said agreement mentioned.

And the said plaintiffs further aver, that they were hindered and prevented by the making the agreement aforesaid from attending to and bidding for the lettings and contracts upon other railroads and canals in various other places, which they otherwise might and would have attended to, bid for, and engaged in, and lost the opportunity of making large gains and profits from the same.

And the plaintiffs further aver, that although after the time of making the agreement aforesaid, to wit, on the 12th day of July, in the year 1836, they entered into another contract or agreement in writing with said company, to do all the grading of that part of section No. 9, in the State aforesaid, which extends from station No. 191 to the end of the piers and wharf in the river Susquehanna, opposite Havre de Grace; the said last mentioned agreement was made and entered into with the express determination and understanding on the part of the plaintiffs, and it was so declared to defendants at the time by said plaintiffs, that by entering into said second agreement they did not waive, abandon, or relinquish the first agreement so made as aforesaid; but that notwithstanding the said second agreement the said plaintiffs held and considered said defendants liable and responsible to them for

all the loss, injury, and inconvenience they had suffered or been put to by the non-fulfilment on the part of the defendants of all the matters and things in said first agreement to be performed, fulfilled, and kept, according to the true intent and meaning of said first agreement; and said plaintiffs declare that they have at all times since the making of the said first agreement been prepared and willing to have fulfilled, performed, and kept all the matters and things in said first agreement on their part to be fulfilled, performed, and kept, to wit, at Cecil county aforesaid. Nevertheless the said defendants, well knowing the premises, but intending and contriving artfully and deceitfully to defraud and injure the said plaintiffs, on the first day of December, in the year 1835, at Wilmington, that is, at Cecil county aforesaid, wholly declined and refused to perform, fulfil, and keep any of the matters and things in the said first agreement specified and contracted on their part to be performed, fulfilled, and kept, and took the work in said agreement specified out of the hands of said plaintiffs against their will, whereby the said plaintiffs were unjustly and fraudulently prevented from executing the work in said agreement contracted to be done, and deprived of all the benefits and advantages which they were entitled to, under said agreement, and suffered great loss of money, inconvenience, and expense, and thrown out of employment, whereby they suffered great loss and injury in their reputation as contractors; in consequence of which many laborers, and others whose services they had engaged, refused to be employed or retained by them any longer, and said plaintiffs lost all the gains and profits which they might and would otherwise have made from finishing and completing the grading of the railroad from Charlestown to the Susquehanna river.

And the said Sebre and Hiram Howard, by their attorneys aforesaid, further complain, for that whereas the said plaintiffs heretofore, to wit, on the 12th day of July, 1836, at the county aforesaid, made another agreement in writing with the said Wilmington and Susquehanna Railroad Company, amongst other things in said agreement specified, to do all the grading of that part of section No. 9, in the State of Maryland, of the Wilmington and Susquehanna railroad, which extends from station No. 191 to the end of the piers and wharf in the river Susquehanna, opposite Havre de Grace, according to the directions of the engineer and the specification in said contract, for the sum of twenty-six cents per cubic yard for every cubic yard excavated, the said section to be completed in a workmanlike manner, viz., one mile from station No. 191, by the 15th of October, 1836, and the residue by November the 1st ensuing; which said agreement and specification, and all things therein contained, is of the tenor and in the words following, to wit:

Agreement.

Agreement between Sebre Howard and Hiram Howard of the first part, and the Wilmington and Susquehanna Railroad Company of the second part. The party of the first part, in consideration of the matters hereinafter referred to and set out, covenants and agrees, to and with

the party of the second part, to furnish and deliver at the proper cost of the said party of the first part, the building materials which are described in the annexed schedule to the said party of the second part, together with the necessary workmanship and labor on said railroad; and at such times and in such quantities as the party of the second part shall require and designate, and faithfully, diligently, and in a good and workmanlike manner to do, execute, and perform the office, work, and labor in the said schedule mentioned; and the party of the second part, in consideration of the premises, covenants and agrees to pay the party of the first part the sums and prices in the said schedule mentioned, on or before the 1st day of November next, or at such other times and in such manner as are therein declared. Provided, however, that in case the party of the second part shall at any time be of opinion that this contract is not duly complied with by the said party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular or negligent, then and in such case he shall be authorized to declare this contract forfeited, and thereupon the same shall become null, and the party of the first part shall have no appeal from the opinion and decision aforesaid; and he hereby releases all right to except to, or question, the same in any place or under any circumstances whatever; but the party of the first part still remain liable to the party of the second part for the damages occasioned to him by the said non-compliance, irregularity, or negligence. And provided, also, that in order to secure the faithful and punctual performance of the covenants above made by the party of the first part, and to indemnify and protect the party of the second part from loss in case of default and forfeiture of this contract, the said party of the second part shall, notwithstanding the provision in the annexed schedule, be authorized to retain in their hands, until the completion of the contract, fifteen per cent. of the moneys at any time due to the said party of the first part. Thus covenanted and agreed by the said parties, this twelfth day of July, 1836, as witness their seals.

SEBRE HOWARD, [SEAL.]
JAMES CANBY, *Prest.* [SEAL.]

Sealed and delivered in the presence of—

The date above changed to 1st November, and in the schedule the price changed to 26 cents, and an extra price for extra haul inserted, and the work fixed to be done by Nov. 1, 1836, before signing.
W. P. BROBSON.

Schedule.

(Schedule referred to above.)

The above named Sebre Howard and Hiram Howard contract to do all the grading of that part of section No. 9, in the State of Maryland, of the Wilmington and Susquehanna railroad, which extends from station No. 191 to the end of the piers and wharf in the river Susque-

hanna, opposite Havre de Grace, according to the directions of the engineer, and according to the specifications hereto annexed, for the sum of twenty-six cents per cubic yard; for every cubic yard excavated the said section to be completed in a workmanlike manner, viz., one mile from section No. 191 by October 15, 1836, and the residue by November 1st ensuing. They also contract to make the embankment at the river from the excavation of the road, provided the haul shall not exceed a distance of eight hundred feet from the eastern termination of the said embankment; all other portions of the hauling together not to exceed an average of eight hundred feet; and for any distance exceeding the said average the price is to be one and a half cents per cubic yard for each hundred feet haul.

The party of the second part contracts to pay to the said Sebree and Hiram Howard the said sum of twenty-six cents per cubic yard in monthly payments, according to measurement and valuation of the engineer, retaining from each payment fifteen per cent. until the final completion of the work. If any additional work, in consequence of water, grubbing, or hard material, is required on the side ditch or ditches through Cowden's woods, the same is to be decided by the engineer, as in case of rock, &c.

Specification.

Specification of the manner of grading the Wilmington and Susquehanna railroad.

Before commencing any excavation or embankment, the natural sod must be removed to a depth of three inches from the whole surface occupied by the same, for the purpose of afterwards sodding the slopes thereof, and all stumps, trees, bushes, &c., entirely removed from the line of the road as directed by the engineer. In case of embankment, a grip must be cut about one foot deep for footing the slopes and preventing them from slipping.

The embankment must be very carefully carried up in layers of about one foot in thickness, laid in a hollow form, and in so doing all hauling or wheeling, whether loaded or empty, must be done over the same. The slopes of the excavations and embankments will be $1\frac{1}{2}$ horizontal to one perpendicular, except where otherwise directed by the engineer, and are to be sodded with the sods removed from the original surface; side ditches and back drains must be cut wherever ordered by the engineer, at the same price as the common excavation. The side ditches will, on an average, be about 9 feet wide on top and about two feet deep, and will extend along a great portion of the road.

In most places where embankments are to be made, the cutting of the adjacent parts is about sufficient for their formation; and as the contractor is supposed to have examined the ground and profiles, and to have formed his estimates accordingly, no allowance will be made for extra hauling. Where more earth is required than is procured from the excavations, the contractor shall take it from such places as the engineer may direct, the cost per cubic yard being the same as the other parts.

Where there is any earth from the excavations more than is required for the embankments, it shall be placed where ordered by the engineer.

All estimates will be made by measuring the excavations only. Loose rock, boulders, iron stone, or other pebbles, of a less weight than one-fourth of a ton, are to be removed by the contractor at the same price as the common excavation; but in cases of larger size or for blasting, the price shall be a matter of special agreement between the contractor and engineer; and if the former should not be willing to execute it for what appears to the engineer a fair price, the latter may put the same into other hands.

No extra allowance will be made for cutting down trees, grubbing, bailing, or other accidental expenses.

Measurements and estimates will be taken about once a month, and full payment will be made by the directors after deducting fifteen per cent., which deduction on each estimate will be retained until the entire contract is completed, which must be on or before the .

It is to be distinctly understood by the contractors, that the use of ardent spirits is strictly forbidden.

WILLIAM STRICKLAND,
Chief engineer of the Wil. & Sus. R. R.

And thereupon afterwards, to wit, on the said 12th day of July, in the year 1836, at the county aforesaid, in consideration that the plaintiffs, at the special instance and request of the said defendants, had then and there undertaken, and faithfully promised the said defendants, to perform and fulfil all things in said agreement on said plaintiffs' part and behalf to be performed and fulfilled. They, they said defendants, undertook and faithfully promised the said plaintiffs, to perform and fulfil all things in said agreement on the defendants' part to be performed and fulfilled. And the said plaintiffs declare, that soon after the making of the said agreement, for the purpose, and with the intent of fulfilling and performing all things in said agreement on their part to be performed and fulfilled, to wit, on the 23d day of July, 1836, at the county aforesaid, they promptly and diligently commenced doing and executing the grading of that part of section No. 9, in said agreement set out and contracted for by them, and were fully prepared with laborers, means, and instruments to execute the work in the manner and in the time specified in said agreement for the completion of the same, and continued actively and diligently to prosecute and do the work of grading, and all other work contracted for in said agreement, until the seventeenth day of September, in the year 1836, when said plaintiffs were served by the sheriff of Cecil county with a writ of injunction issued from the high court of chancery, sealed with the seal of the State of Maryland, and signed by the honorable Theodorick Bland, chancellor, which said injunction was of the tenor following, to wit:

MARYLAND, *sct.*

The State of Maryland, to the Delaware and Maryland Railroad Company, its president and directors, agents and servants, of Cecil county, greeting:

[SEAL.] Whereas John Stump hath exhibited to us in our court of chancery his bill of complaint against you, the said Delaware and Maryland Railroad Company, for relief in equity, and to prohibit and enjoin you, the said Delaware and Maryland Railroad Company, your president and directors, agents and servants, and each and every of you, to forbear, desist, surcease, and refrain, absolutely and altogether, from making, constructing, and completing the wharf contemplated and laid out by you, the Delaware and Maryland Railroad Company, from the lot leased by the father of the said complainant to Martha Coffield, in the Susquehanna river, and from all and every act whatsoever towards the making, completing, or using in any manner the said wharf, or any part thereof; and from placing any stone, gravel, earth, logs, timber, board, or any other substance or material on said wharf, or any part thereof, or in the said river, and from driving down piles or timbers in said river, and from every other and further act touching or affecting the said wharf commenced by you from the Cecil shore of the Susquehanna river, until the matter shall be heard in equity. We therefore do hereby command, and strictly enjoin you, the said Delaware and Maryland Railroad Company, your president and directors, and agents and servants, that from henceforth you, and each and every of you, do absolutely forbear, desist, surcease, and refrain altogether from making, constructing, or completing the said wharf contemplated and laid out by you, the said Delaware and Maryland Railroad Company, from the lot leased by the father of the said complainant to the said Martha Coffield, on the Susquehanna river, and from all and every act whatsoever towards the making, completing, or using in any manner the said wharf, or any part thereof; and from placing any stone, gravel, earth, logs, timber, boards, or any other substance or material on said wharf, or any part thereof, or in the said river, and from driving down piles or timbers in said river, and from any other and further act touching or affecting the said wharf commenced by you from the Cecil shore of the Susquehanna river, until the further order of the court of chancery.

Witness the honorable Theodorick Bland, esquire, chancellor, this 13th day of September, 1836.

Test. RAMSAY WATERS,
Register cur. con.

In chancery, September 13, 1836.

Ordered that writs of subpœna and injunction issue as prayed by the foregoing bill of complaint; and it is further ordered that at any time after the said defendants have filed their answers, the court will hear a motion to dissolve the said injunction. Provided the said defendants

give to the said plaintiff, or his solicitors, ten days' notice thereof, and the register is directed to endorse a copy of this order on the said writ of injunction, that it may be served therewith on the said defendants.

THEODORICK BLAND, *Ch'r.*

On which injunction was thus endorsed:

Injoined. NOBLE PENNINGTON, *Sheriff.*

True copy.—Test: RAMSEY WATERS, *Reg. Cur. Con.*

By means of which injunction the plaintiffs were prevented and delayed from executing the work in said agreement contracted to be performed and done in the time specified in said agreement, and were injoined and prohibited from working upon that part of the railroad in said injunction mentioned, being part of section No. 9 in said agreement mentioned, for a long space of time, to wit, from the said 17th day of September, the day on which said injunction was served, until the 30th day of October, in the same year, being the day when said injunction was appealed from, and appeal bond filed; whereby said plaintiffs suffered great delay, inconvenience, and expense in conducting and performing the grading of the railroad in said agreement mentioned, for and during the whole time said injunction remained and continued in force. And said plaintiffs declare, that at the time of the making of said agreement the ground upon which the said railroad was to be graded was laid down on the profile prepared by the engineer, and marked out by stakes to shew the width of the railroad track at the surface of the earth, and also the width of the embankments, (as referred to in the specification in said agreement,) all of which were examined by the said plaintiffs at the request of the defendants, before they made and entered into said agreement. And said plaintiffs aver, that although a great part of the embankment to be made was staked out and laid down on the profile to be only 15 feet wide at the top, the engineer ordered and directed the plaintiffs to make the embankment 30 feet wide at the top, along a great part of the railroad in said agreement mentioned. And said plaintiffs further aver, that whilst they were executing the work according to the profile aforesaid, the engineer of the defendants ordered and directed the plaintiffs to grade the railroad feet deeper than it was laid down on said profile, whereby said plaintiffs were greatly delayed, and were prevented from completing the first mile of the road before the 20th of October, 1836, which was then completed and finished according to, and under the direction of, the engineer aforesaid.

And said plaintiffs further aver, that notwithstanding the said injunction, and all the other actings and doings of the said defendants in the premises as aforesaid, they did with great diligence and care, and with all proper and necessary means, and without any unnecessary or unavoidable delay, proceed with and continue to execute the work in said agreement specified, according to the terms and conditions thereof, in a

faithful and workmanlike manner, and did observe, fulfil, and keep all the terms and conditions of said agreement on their part to be observed and kept, or, except so far only as they were prevented from finishing the work in the times specified in said agreement by the injunction aforesaid, and the orders, interference, and hindrance of the said defendants; and that after the said 15th day of October, 1836, and the said first day of November, the times fixed for the completion of the said work in the said agreement, they proceeded under the orders of the engineer aforesaid, and at the request and by the permission of said defendants, and by the authority and in virtue of the agreement aforesaid, to execute the work in said agreement mentioned, according to the terms and conditions thereof, and performed and fulfilled every thing on their part by said agreement to be done and performed, from the time of the making said agreement until the 13th day of January, in the year 1837.

And said plaintiffs declare that the engineer of said company estimated the work of said plaintiffs done under said agreement in the month of December, 1836, according to measurement and valuation, at the sum of three thousand six hundred and some dollars, before deducting the 15 per cent. specified in said agreement to be retained by said company until the final completion of said work; yet the said defendants, disregarding the terms of said agreement, although often requested so to do, at the county aforesaid, have not yet paid the said sum of $3,600, after deducting the 15 per cent. aforesaid, but contriving and intending to defraud and injure said plaintiffs, after paying them one thousand dollars, a part of said estimate, refused and still refuse to pay the balance.

And said plaintiffs further aver, that according to the terms of said agreement where there was any earth from the excavations more than was required for embankments, it was to be placed where ordered by the engineer; yet the defendants well knowing the premises, on the day of January, 1837, at Wilmington, that is to say, at Cecil county aforesaid, (notwithstanding the request and demand of the plaintiffs in this behalf,) but intending and contriving artfully and deceitfully to defraud and injure the said plaintiffs, refused to permit the engineer to point out or order any place where to deposit the earth from the excavations, although there was a large quantity of earth to be removed from the excavations more than was required for the embankments; and also refused to pay the said plaintiffs one and a half cents per cubic yard for each hundred feet haul, over eight hundred feet in distance, as by the terms of said agreement they were bound and required to do; but said defendants artfully and fraudulently contriving to impose upon said plaintiffs by forcing them to submit to an alteration of the terms of said agreement, or to be deprived of all the benefits and advantages which they were entitled to under the same, declared the said agreement to be forfeited, and refused to comply with the terms and conditions thereof, on their part to be observed, fulfilled, and kept; whereby said plaintiffs were suddenly thrown out of employment, and unjustly and fraudulently prevented from completing the work contract-

ed to be done by them as aforesaid, and have lost all gains and profits which they might and would otherwise have made and acquired from finishing the work according to said agreement; whereupon the said plaintiffs say, that they are injured and defrauded, and have sustained damage to the amount of fifty thousand dollars, to wit, at Cecil county aforesaid, and therefore they bring their suit, and so forth.

HY. STUMP,
Attorney for plaintiffs.

April term, 1838.

This narr. is filed in its present form, with the agreement that the blanks may be filled up at any time, and a copy of the written agreement as declared upon to be altered (if necessary,) so as to be a copy hac verba of the agreement offered in evidence.

J. C. GROOME,
Att'y for defend'ts.
HY. STUMP,
Attorney for pl'ffs.

And thereupon the said Sebre Howard and Hiram Howard, by their attorneys aforesaid, pray that the said Wilmington and Susquehanna Railroad Company may answer to the declaration of them, the said Sebre Howard and Hiram Howard, in the plea aforesaid.

Whereupon it is ruled by the court here that the said Wilmington and Susquehanna Railroad Company answer to the declaration of the said Sebre Howard and Hiram Howard on the plea aforesaid, or judgment will be rendered against them by default.

And the said Wilmington and Susquehanna Railroad Company, by their attorneys aforesaid, defend the force and injury, when, &c., and pray leave of the court here to imparle until the third Monday of October next, to answer to the declaration of the said Sebre Howard and Hiram Howard in the plea aforesaid, and they have it; the same day is given to the said Sebre Howard and Hiram Howard, then, &c. At which said third Monday of October, in the year of our Lord 1838, until which day the said Wilmington and Susquehanna Railroad Company had leave to imparle, and then to answer to the declaration of the said Sebre Howard and Hiram Howard in the plea aforesaid, comes as well the said Sebre Howard and Hiram Howard, by their attorneys aforesaid, as the said Wilmington and Susquehanna Railroad Company, by their attorneys aforesaid.

Whereupon, on motion of the said Sebre Howard and Hiram Howard, by their said attorneys, commission issued to John C. Vaughan, Edward P. Cranche, Nicholas Longworth, and Samuel Findley, of Cincinnati, Ohio, which said commission, together with the interrogatories, depositions, and the return of the said commission, are as follows, to wit:

Commission to Cincinnati, Ohio.

CECIL COUNTY, *to wit:*

The State of Maryland to John C. Vaughan, Edward P. Cranch, Nicholas Longworth, and Samuel Findley, of Cincinnati, Ohio, greeting:

[SEAL.] Be it known, that you are appointed commissioners to examine evidences in a cause depending in Cecil county court, between Sebre Howard and Hiram Howard, plaintiffs, and the Wilmington and Susquehanna Railroad Company, defendants. Therefore you are requested, having first taken the oath hereunto annexed, and also administered the annexed oath to the person whom you shall appoint as clerk, to attend the execution of this commission, that at such time and place as to you shall seem convenient, you cause to come before you all such evidences as shall be named or produced to you, by either the plaintiffs or defendant; and that you examine them upon their corporal oaths, to be by you administered on the Holy Evangely of Almighty God, touching their knowledge or remembrance of any thing that may relate to the cause aforesaid, and that you cause notice to be given to the parties, or their attorneys, of the execution of this commission before you execute the same; and having reduced the depositions of the witnesses so taken by you into writing, you send the same, with this commission closed, under your hands and seals, to the said county court, to be held at the court-house in Elkton, in and for Cecil county aforesaid, with all convenient speed. Witness the honorable Ezekiel F. Chambers, chief judge of the said court, the tenth day of April, 1838.

Issued the 10th day of October, 1838.

JAMES SEWALL, *Clk.*

HY. STUMP, *for pl'ffs.*
JOHN C. GROOME, *for def'ts.*

(*Commissioner's oath.*)

You shall, according to the best of your skill and knowledge, truly, faithfully, and without partiality to any or either of the parties, take the examination and deposition of all and every witness and witnesses produced and examined by virtue of the commission hereunto annexed, upon the interrogatories now, or which may hereafter, before the said commission is closed, be produced to and left with you by either of the said parties, so help you God.

STATE OF OHIO, *Hamilton county.*
CITY OF CINCINNATI, *ss.*

I, Samuel W. Davies, mayor of said city, do hereby certify, that the above oath was by me duly administered to John C. Vaughan, Edward

P. Cranch, Nicholas Longworth, and Samuel Findley, the commissioners herein named, this 22d day of November, 1838. Given under my hand and seal of the city, this day and year aforesaid.

[SEAL.]

SAMUEL W. DAVIES,
Mayor.

(*Clerk's oath.*)

You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take, write down, and transcribe the depositions of all and every the witness and witnesses, produced before and examined by the commissioners named in the commission hereunto annexed, as far forth as you are directed and employed by the said commissioners to take, write down, and transcribe the said depositions or any of them, so help you God.

T. O. PRESCOTT.

The above oath was administered to T. O. Prescott, as our clerk, this day. Sworn and subscribed before us, this twenty-second day of November, 1838.

N. LONGWORTH,
EDWARD P. CRANCH,
SAMUEL FINDLEY,
JNO. C. VAUGHAN,
Commissioners.

SEBRE HOWARD and Hiram Howard
vs.
THE WILMINGTON and Susquehanna Railroad Company.

Cecil county court. Interrogatories to be propounded, witnesses to be examined, under commission to be issued to Cincinnati, Ohio.

Plaintiff's interrogatories.

Questions to be propounded to Mr. Raymond P. Dowden, of Hamilton county, Ohio, in the above cause, and other witnesses:

1st. Are you acquainted with the parties in the above entitled cause, and how long have you known them?

2d. Do you or do you not know that the plaintiffs executed the 5th and part of the 4th sections of the 1st division, Wilmington and Susquehanna railroad, and in what year?

3d. Do you or do you not know that the engineer having charge of the work, furnishing the plaintiffs at or near the time the work was commenced, with a plat or profile to work the 5th section by?

4th. Did or did not the plat represent the section to commence at Christiana creek, and extend to a road three or four hundred yards short of the State line, between Delaware and Maryland?

5th. Did or did not the engineer tell plaintiffs in your presence to execute the work according to the plat given them?

6th. Did you or did you not hear Mr. Pemberton, the resident engineer, tell the plaintiffs, after ascertaining the State line was not where marked on the plat, (but three or four hundred feet further along,) that the section should end where marked on the plat; that Mr. William Strickland had told him to give the plaintiffs such directions, and to waste the balance of the earth of the cut?

7th. How was the earth wasted, and when was the section finished?

8th. Did you or did you not hear the engineers say that the work was finished, and well executed?

9th. Did you or did you not frequently hear the principal assistant engineer, Mr. J. C. Troutwine, and the resident engineer, Mr. Pemberton, say during the autumn of 1835 that they were glad that the company had given the plaintiffs the large job between Charlestown and Havre de Grace, as they (the plaintiffs) had never given them any trouble in the work they were executing?

10th. Have you or have you not frequently heard the engineers say that they were nearly ready for the plaintiffs to commence on the work between Charlestown and Havre de Grace, and that the plaintiffs must hold themselves in readiness, as the work was an extensive one, and would have to be pushed rapidly to get through in time?

11th. Did or did not Mr. J. Canby, the president of the company, call at the office of the plaintiffs in his absence, and inquire for him?

12th. Did he or did he not then tell you to tell the plaintiffs that they must be ready and well prepared to execute the heavy job in Maryland; that it was of immense importance to the company to have said work done in time, and that they are nearly ready to set the plaintiffs at work, which would be in a week or ten days?

13th. Did he or did he not charge you, in particular, not to forget to tell plaintiffs what he had told you, and at what time was this?

14th. Did or did not the plaintiffs make large preparations to execute the said work by hiring and working three times as many men, horses and carts, as they could work to advantage upon the work they were executing, in order to be well prepared for the heavy job before mentioned?

15th. Did they or did they not (the plaintiffs) engage a great many managers for that work, and also boarding masters, who laid in a large amount of provisions in preparing to board from one to two hundred men each?

16th. Did they or did they not advertise for from twelve to fifteen hundred men, and five hundred horses and carts for that job?

17th. Did or did not the plaintiffs give Messrs. Meteer and Thomas the finishing the 4th section, in order to compensate them for the disappointment of not employing them upon the large job before mentioned?

18th. Did or did not the plaintiffs' credit as contractors, among the the laboring classes, very much suffer on account of the large job being taken from them, and have they not been frequently abused since that time for promising them work on the said job, and advertising for so many hands, and not giving them work?

19th. Did or did not this disappointment prevent hands from going on to a job the plaintiffs undertook in Virginia, on the James river and Kenawa canal, soon after they had the large job taken from them, or was not that the reason they all assigned for not going?

20th. *Was* you, or *was* you not, employed the summer of 1836 by the plaintiffs as their principal manager and clerk, upon the western extremity of said road, extending from the Susquehanna river about two miles east, partly through the farm of Mr. Evans?

21st. Did you, or did you not, hear Mr. William Strickland, who was engineer in chief at that time, tell the plaintiffs that they intended to grade down Mr. Coffield's lot to supply the deficiency in the embankment; that there was not enough material in the cut from the embankment?

22d. After the injunction was served upon that end of the work by Mr. John Stump, and Mr. J. P. Stabler became engineer in chief, did you, or did you not, hear Mr. Stabler tell the plaintiffs to stop operations on that end at the river Susquehanna until the injunction was removed, which would be in the course of a few days, not more than a week at farthest?

23d. Did he, or did he not, tell him, (one plaintiff,) to work his whole force upon the eastern end of the section until the injunction was removed?

24th. Was, or was not, the force principally boarded at the western end of the work, in consequence of being employed at the river making the heavy embankment; and did they not necessarily lose two hours every day going to and from the work on account of its being two miles from where they had to board?

25th. Did or did not the promise of the engineer, from time to time, that the injunction would be removed in a short time, prevent the plaintiff's having his boarding shantees moved convenient to the work at the western end?

26th. Did or did not the plaintiffs make an arrangement with Mr. Evans to waste the surplus earth from the cut at the eastern end of the section, by scooping it out of the cut on to Mr. Evans' land, and *was* the scoops purchased for that purpose, and was not that the most speedy and cheap method of executing it; and would the plaintiffs not have had the eastern mile and a half finished by the 10th of October, 1836, had the plaintiffs have had an opportunity of wasting the material contemplated by scooping?

27th. Was or was not the embankment through Mr. J. Cowden's field, staked out, at the time plaintiffs took the work, for a single track, and was it, or was it not, afterwards changed to a double track; and was not the material taken at a long haul, to supply this extra width, from where the plaintiffs intended to have wasted with the scoops as before stated?

28th. Was there, or was there not, a culvert placed near the eastern end of the embankment, through Mr. J. Cowden's woods, that was not intended at the time plaintiffs took the work; and, in consequence

of that culvert's not being built in time, was it not a great hindrance to the plaintiffs not finishing the mile and a half by the 15th of October, 1836?

29th. State what time the mile and a half was finished, or as near as it could be on account of the culverts not being done, so that plaintiffs could make the embankment over them.

30th. Was it, or was it not, almost impossible to get the surface of the cut broken, (after the injunction was removed,) on account of the sun's baking it so excessively hard, and what did it cost the plaintiffs extra on account of the before named disadvantage, (on account of the surface being baked so very hard?)

31st. State how much the grubbing, clearing, and removing the roots out of the surface of the cut through Mr. J. Stump's wood cost the plaintiffs.

32d. Was or was not the costs of the excavation very much increased on account of the ground being frozen in November, December, and January; and to what amount did it increase the costs?

33d. Did you, or did you not, hear Mr. J. P. Stabler say, and Captain De la Roche frequently tell the plaintiffs that the embankment must be carried out to the wharf, so as to secure it from the breaking up of ice in the spring, let it cost what it would?

34th. Did or did not the plaintiffs cause said embankment to be carried out to the wharf, some six or seven hundred feet into the river, according to express orders of the engineers having charge of the work?

35th. State what the increased cost was in excavating material for the embankment, in November and December, in consequence of the ground being frozen.

36th. Did you, or did you not, hear Captain De la Roche, principal assistant engineer, and acting principal at the time, tell the plaintiffs not to place any more material on the embankment extending into the river, and at what time was this?

37th. Did or did not the plaintiffs ask Captain De la Roche, at the time he directed them not to place any more material on the embankment, to point out a place to waste the earth plaintiffs were then excavating?

38th. What was his reply when called upon by the plaintiffs to direct him where to place the surplus material?

39th. After the engineer's refusing to give directions where to place the surplus material, did not the plaintiff endeavor to obtain the privilege of wasting the said material upon Mr. J. Stump's land in order to keep the force employed through the winter?

40th. Could or could not the plaintiffs have worked the force through the winter in the cut through Mr. J. Stump's woods to a good advantage, had the engineers directed where to waste the material before the winter set in?

41st. Did or did not the plaintiff do all in his power to keep the force agoing, notwithstanding the cold weather, until he went on to Wilmington for his estimate, about the first of January, 1837; and did not

you keep the force agoing while plaintiff was gone to Wilmington; and did not plaintiff do every thing in his power after he returned to keep the work open; and did he not continue to work a large force until the 6th January, 1837, with picks, mattocks, &c., to keep the work open; and what number of hands did plaintiffs employ up to 6th January, 1837?

42d. Did or did not the plaintiffs do every thing in their power to keep the force together, promising them employment as soon as the cut could be opened, from that on until the job was finished; and did not plaintiff repeat his promises to the men until he again went on to Wilmington for the estimate for work done in December, and what time was this?

43d. Were or were not the hands very indignant and abusive on account of being kept out of their money so long, and finally being thrown entirely idle in middle of January by the job being taken from the plaintiffs?

44th. Did or did not the hands generally declare that they never would again work for the plaintiffs on account of being thrown out of employment two winters in succession.

45th. Were the plaintiffs popular, or were they not, with the laboring classes before the aforesaid disappointment?

46th. Would or would not the plaintiffs have been in danger of having their lives taken by the laborers had they returned to the section without money to pay them; and was it not the general impression at that time?

47th. Did or did not the plaintiffs finally succeed in paying the laborers; and how did they obtain funds?

48th. Were or were not the plaintiffs very much pressed in meeting their notes in bank, where they borrowed money to pay their laborers?

49th. Were or were not the plaintiffs indebted for goods to a considerable amount purchased for work, a part of which they had to sacrifice at the close of their operations upon that work; and had they not to dispose of their working tools, buildings, blacksmiths' tools, working cattle, &c., &c., at a great loss, and to what amount?

50th. Have the plaintiffs, or have they not, been constantly kept in difficulty in consequence of their being so much in debt on account of said work?

51st. Was or was not that part of the work which the company took from the plaintiffs the best portion of the whole work, after it was grubbed and cleared of roots in the manner it was done by the plaintiffs?

52d. Could or could not the material have been excavated and hauled to the embankment in the river, where it was afterwards hauled or placed, for sixteen cents per cubic yard on a temporary railroad as plaintiffs intended to construct, and had they not already entered into an agreement for rail timber for that purpose?

53d. State how long you have been acquainted with the plaintiffs' operations upon public works; have they or have they not always finished their works in less time than was allowed them in their contract since your acquaintance with them?

54th. Could or could not the plaintiffs have finished their work within the time given them had they not been deterred by the injunction, and had not the work been increased by sinking the grade of the road the last six feet?

55th. Was there or was there not a great number of hands daily applying for work at the time the heavy part of the section was stopped by the aforesaid injunction; and could not plaintiffs have employed hands, horses, and carts enough to have finished the section before the winter set in, notwithstanding the sinking of the grade, had they not been deterred by the said injunction?

56th. Was or was not the intention of the plaintiffs to have employed force enough to have finished the work within the time given them in their contract?

57th. Was there or was there not more embankment than excavation upon the western end of the section when the contract was made?

58th. Was or was not the surplus material created by the grade being sunk the last six feet?

59th. State if there has been any evidence omitted in favor or against either party; if so, state what has been omitted.

On the back was thus endorsed, to wit, service admitted.

J. C. GROOME,
For defendants.

Cross interrogatories.

SEBRE HOWARD and Hiram Howard
vs.
WILMINGTON and Susquehanna Railroad Company.

Cecil county court.

Cross interrogatories to be propounded to the witnesses to be produced, sworn, and examined on the part of the plaintiffs, under commission to be issued to John C. Vaughan, Edward P. Cranch, Nicholas Longworth, and Samuel Findley, esquires, of Cincinnati, Ohio.

2d interrogatory in chief. This interrogatory objected to by the defendants.

3d interrogatory. Objected to.
4th interrogatory. Objected to.
5th interrogatory. Objected to.
6th interrogatory. Objected to.
7th interrogatory. Objected to.
8th interrogatory. Objected to.
9th interrogatory. Objected to.
10th interrogatory. Objected to.
11th interrogatory. Objected to.
12th interrogatory. Objected to.
13th interrogatory. Objected to.

1st cross interrogatory. 14th interrogatory. If you answer this 14th interrogatory in chief affirmatively, state how you know that the plaintiffs made large preparations for the purpose of executing the contracts alleged to be made in this cause in Maryland; whether the plaintiffs had not at that time, or a short time thereafter, heavy contracts in Virginia or elsewhere, and what those contracts in Virginia or elsewhere were; declare also how many men, horses, and carts were necessary to complete the work in which plaintiffs were then engaged, and the exact number of men, horses, and carts at that time actually hired by the plaintiffs.

2d cross interrogatory. If you answer the 5th interrogatory, state the names and the number of managers and boarding masters engaged by the plaintiffs, and how you know that they were engaged for the work, or alleged contract in Maryland, mentioned in this cause; declare also how you acquire your knowledge of the amount and quantity of provisions laid in by any or all of these boarding masters, when and where the provisions were laid in, what quantity, and by whom.

16th interrogatory. Objected to.
17th interrogatory. Objected to.
18th interrogatory. Objected to.
19th interrogatory. Objected to.
20th interrogatory. Objected to.
21st interrogatory. Objected to.
22d interrogatory. Objected to.
23d interrogatory. Objected to.
24th interrogatory. Objected to.
25th interrogatory. Objected to.
26th interrogatory. Objected to.
27th interrogatory. Objected to.
28th interrogatory. Objected to.
29th interrogatory. Objected to.
30th interrogatory. Objected to.
31st interrogatory. Objected to.
32d interrogatory. Objected to.
33d interrogatory. Objected to.
34th interrogatory. Objected to.
35th interrogatory. Objected to.
36th interrogatory. Objected to.
37th interrogatory. Objected to.
38th interrogatory. Objected to.
39th interrogatory. Objected to.
40th interrogatory. Objected to.
41st interrogatory. Objected to.
42d interrogatory. Objected to.
43d interrogatory. Objected to.
44th interrogatory. Objected to.
45th interrogatory. Objected to.
46th interrogatory. Objected to.

47th interrogatory. Objected to.
48th interrogatory. Objected to.
49th interrogatory. Objected to.
50th interrogatory. Objected to.
51st interrogatory. Objected to.
52d interrogatory. Objected to.
53d interrogatory. Objected to.
54th interrogatory. Objected to.
55th interrogatory. Objected to.
56th interrogatory. Objected to.

3d cross interrogatory. 57th interrogatory. If you answer this 57th interrogatory in chief affirmatively, state how many yards there were of excavation, and how many of embankment at the time the altered contract was made; and how you acquire your information.

58th interrogatory. Objected to.
59th interrogatory. Objected to.

The defendants claim to have the benefit of the objections to the several interrogatories in chief herein objected to at the trial of this cause.

J. C. GROOME,
Att'y for defendants.

Be it known, that the following deposition was taken before us, the undersigned commissioners, on the twenty-second day of November, 1838, and on several days thereafter, until the twenty-seventh instant, inclusive, at the office of Messrs. Vaughan and Cranch, attorneys at law, in Cincinnati, Hamilton county, Ohio, in pursuance of the commission hereto attached. In testimony whereof we have signed and sealed the certificate at the conclusion of this deposition.

Depositions taken in a cause depending in Cecil county court, State of Maryland, between Sebre Howard and Hiram Howard, plaintiffs, and the Wilmington and Susquehanna Railroad Company, defendants, taken at the office of Messrs. Vaughan and Cranch, in the city of Cincinnati, county of Hamilton, State of Ohio, on the day of , in the year eighteen hundred and thirty-eight, in pursuance of the commission from said court hereto attached.

Deposition of R. P. Dowden.

Raymond P. Dowden, a witness of lawful age, being duly sworn, deposes and says, in answer to interrogatories and cross interrogatories by plaintiffs and defendants hereto attached:

Answer to 1st interrogatory put by plaintiffs: I am acquainted with the parties, and have known the plaintiffs since 1830, and the defendants since 1835.

Answer to the 2d interrogatory: I do know that the plaintiffs finished the 5th section, 1st division of [the] Wilmington and Susquehanna railroad, according to the directions of the engineer, on the 31st day of December, 1835, about 9 o'clock, p. m., they (the plaintiffs,) also executed a part of the 4th section in the same year.

Answer to 3d interrogatory: I do know that the engineers having charge of the work furnished the plaintiffs, at or near the time the work of 5th section commenced, with a plat or profile to work said section by, and they (the engineers) directed the plaintiffs to execute the work according to said plat, and had frequent reference to it.

Answer to 4th interrogatory: It did.

Answer to 5th interrogatory: He did.

Answer to 6th interrogatory: I remember hearing the engineer saying something concerning the State line not being where marked on the plat; but further, I do not recollect the resident engineer, Mr. Pemberton, saying that Mr. Strickland had given him any instructions on the subject at that time. But I do recollect hearing Mr. Pemberton tell plaintiffs to waste the earth along the embankment, or purchase ground, to spoil it as they (the plaintiffs) saw fit, after making the embankment up to the State line, as marked on the plat.

Answer to 7th interrogatory: By purchasing ground of Parson Russel and Mr. McCormick, and piling the surplus earth upon it, and finished on the 31st December, 1835.

Answer to 8th interrogatory: I did hear Mr. Samson, the engineer, on the 1st January, on the morning after he had received the work as finished, say that it was finished and well executed.

Answer to 9th interrogatory: I did.

Answer to 10th interrogatory: I have heard Mr. J. C. Troutwine say, that they were nearly ready for the plaintiffs to commence the work between Charlestown and Havre de Grace, in presence of one of the plaintiffs, two or three times during the months of October and November, 1835, and that they did hold themselves in readiness as requested by the engineers.

Answer to 11th interrogatory: Mr. Canby called at the office of the plaintiffs some time in October, (I think the latter part,) while the plaintiffs were absent, (I think at Elkton.)

Answer to 12th interrogatory: Mr. Canby told me, while at the office above stated, to tell the plaintiffs that he had called there to see them, (the plaintiffs,) and to inform them that they were about ready to allow them to commence operations upon their big job between Charlestown and Havre de Grace, and that they must be well prepared to prosecute said job vigorously, as it was of immense importance to the company to have the work done as early as possible.

Answer to 13th interrogatory: Mr. Canby told me before he left, not to forget to tell the plaintiffs what he had told me; this was in October, (I think the latter part.)

Answer to 14th interrogatory: The plaintiffs did work a much larger force of men, horses and carts, than they could work to any advantage, in order to be prepared to execute the heavy work betweeen Charlestown and Havre de Grace.

Answer to 15th interrogatory: I know that the plaintiffs did engage a great many managers, and also boarding masters.

Answer to 16th interrogatory: The plaintiffs gave out word from

time to time, along the line of the railroad and elsewhere, that they would give constant employ, during the execution of all the work between Charlestown and Havre de Grace, to fifteen hundred men and five hundred horses and carts, and commence operations as soon as the engineers would lay out the work. I also understood that plaintiffs advertised in the Baltimore and Washington papers for the same number of men, horses and carts.

Answer to 17th interrogatory: I have understood from the parties, viz., S. & H. Howard, Meteers & Thomas, that the plaintiffs gave the finishing the 4th section to compensate them for their disappointment.

Answer to 18th interrogatory: I did; they have been very much abused from time to time by the laboring class for disappointing them on the aforesaid job.

Answer to 19th interrogatory: It did. It was.

Answer to 20th interrogatory: It was.

Answer to 21st interrogatory: That was the general impression at the time, but I do not recollect hearing Mr. Strickland mention it in particular.

Answer to 22d interrogatory: I did.

Answer to 23d interrogatory: He did.

Answer to 24th interrogatory: They were. They did.

Answer to 25th interrogatory: It did.

Answer to 26th interrogatory: I understood they did, but was not present at the time the arrangement was made. I do know that the scoops were purchased for that purpose, and that was the most speedy and cheap method of wasting the earth; judging from the manner the work was executing, had plaintiffs had an opportunity of wasting the material by scooping as contemplated, they would have finished it by the 10th of October, 1836.

Answer to 27th interrogatory: It was, (the whole question included.)

Answer to 28th interrogatory: There was a culvert placed near the east end of embankment, through J. Cowden's woods, that was not staked out at the time the contract was made; but whether or not it was intended to have been placed there at the time the contract was made I do not know. The culvert's not being built in time prevented plaintiffs from finishing the mile and ½ by the 15th October, 1836.

Answer to 29th interrogatory: I do not recollect the exact time that the mile and ½ was finished, but I believe by the 1st November, or as near it as could be done, on account of the culvert's not being finished.

Answer to 30th interrogatory: It was. I do not know what it cost the plaintiffs extra, to excavate the surface, after the injunction was removed, on account of its being baked by the sun; but I do know that there were as many as four large plough castings broken in one day in endeavoring to open the surface, and it was at least two weeks before the plough teams could keep the force half employed. It must have been at least five hundred dollars damage to plaintiffs, on account of its being so much baked.

Answer to 31st interrogatory: It cost one thousand and fifty dollars, as near as I can now recollect; I do not think it varies much either way from that amount.

Answer to 32d interrogatory: It was; I cannot say the exact amount it increased the cost by being frozen, but it must have cost twice as much as it would had it not been frozen.

Answer to 33d interrogatory: I did, and they have also given me the same instructions during plaintiffs' absence.

Answer to 34th interrogatory:

They did, but did not carry it to its full height at the further end, in consequence of the wharf not being finished, but as high as Capt. De la Roche would permit them:

Answer to 35th interrogatory:

It must have cost at least one hundred per cent., as I before stated, and I believe a portion of it cost one dollar per cubic yard to excavate.

Answer to the 36th interrogatory:

I did, it being the latter part of December, 1836.

Answer to 37th interrogatory:

They did.

Answer to 38th interrogatory:

It was that he could not give any positive directions about wasting the material, as Mr. Stabler had not given him any instructions to do so, but afterwards told plaintiffs that they might waste it in Mr. Coffield's lot if he, Mr. Coffield, would not come upon the company for damages for so doing.

Answer to 39th interrogatory:

They did; and he refused to give the privilege, as it was of interest to the company who he considered [used] him badly.

Answer to 40th interrogatory.

They could.

Answer to 41st interrogatory:

They did. I did the greater part of the time; but believe there was a day, and a part of a day, that we were forced to stop operations on account of the ground being so hard frozen during the plaintiff's absence which was about four days, and on his return he recommenced with the force of about 60 or 70 men, and worked on until the 6th, breaking frost with picks and mattocks, turning the clods over, and leaving them upon the surface in Mr. John Stump's woods, when the engineer refused to give instructions where the material out of said woods should be placed.

Answer to 42d interrogatory:

The plaintiffs did promise the men from time to time that they would set them to work as soon as the ground could possibly be opened, in order to keep them there ready to commence operations as soon as the weather permitted, and as soon as the engineers would give instructions where to place the material; and they continued to promise from time to time, until they again went on to Wilmington after their ex-

timate for work done in December, 1836, this being in January 1837; the hands generally became very uneasy and abusive on account of being kept idle so long, and not getting their money so that they could go elsewhere.

Answer to 43d interrogatory:

They were, and some of them threatened the lives of the plaintiffs for being kept out of their money so long, and thrown idle at last in consequence of their work being taken from them.

Answer to 44th interrogatory:

They did.

Answer to 45th interrogatory:

They were, and none more so, on account of their always being punctual in paying them for their services.

Answer to 46th interrogatory:

They would, from what the men told me themselves, have been massacred on their arrival without money the second time; the plaintiff being detained longer than usual, the men became very much excited, and threatened to break open the store of the plaintiffs for fear of not getting their money.

Answer to 47th interrogatory:

They did, by borrowing money from bank on their own credit.

Answer to 48th interrogatory:

They were, greatly to their disadvantage.

Answer to 49th interrogatory:

They were, and made great sacrifice in disposing of their goods, working tools, blacksmiths' tools, working cattle, buildings, &c., and to what amount I am unable to say. I think not less than four hundred dollors.

Answer to 50th interrogatory:

They have.

Answer to 51st interrogatory:

It was decidedly the best, owing to its being principally of a sandy nature, and of sufficient depth to have worked to good advantage through the winter by undermining.

Answer to 52nd interrogatory:

It could have been done in my opinion for less (say 15 cts.) on a temporary railroad, as contemplated by plaintiffs at the time, for which the timber was engaged to be delivered for that purpose by J. Hackins.

Answer to 53d interrogatory:

I have known them better than seven years, and believe they have always finished their work in less time than what they had been allowed them in their contracts since my acquaintance with them.

Answer to 54th interrogatory:

They could, undoubtedly.

Answer to 55th interrogatory:

There were from 20 to 30 a day; they could have employed enough force to have finished the section before the winter set in, had they not been hindered by the injunction, and that was their intention.

Answer to 56th interrogatory:

It was their intention according to what I understood from them, (plaintiffs,) and from what I could judge of their movements.

Answer to 57th interrogatory:

There was, from the best of my observation, but I never entered into any calculation.

Answer to 58th interrogatory:

The embankment was greatly diminished, and the excavations greatly increased, by sinking the grade; I am unable to say.

The expense of grading down the narrow pass or road crossing the railroad at right angles, between Mr. Coffield's and John Stump's farm, to pass to and from Mr. John Stump's residence, must have cost the plaintiffs one hundred dollars extra, on account of its being narrow and difficult to excavate. The plaintiffs also had to remove at least one hundred yards of stone in detached masses, which were large enough to come under the denomination of rock, which was to be paid for at the estimate of the engineer according to his contract with the company. The plaintiffs were also considerably delayed in consequence of having to make a bridge to pass round Mill creek culvert, in order to make the embankment through Mr. Cowden's woods. They were also very much delayed by a culvert near the eastern end of the said embankment, not laid out at the time the contract was made. If said culvert had been done in time, the plaintiffs would have made said embankment from the cut through Mr. J. Stump's land; but in consequence of said culvert's not being finished in time, the plaintiffs were forced to make said embankment from a cut through Mr. Evans' land, at a much longer haul than it would have from Mr. Stump's land; the haul of the material to make said embankment, from the eastern side of culvert, was upon an average thirty-eight hundred feet, and according to the best of my knowledge and belief, from observation, there were eighteen hundred yards of embankment.

Cross examination.

Answer to 1st cross interrogatory:

14th interrogatory. I know that the plaintiffs made large preparations for executing the job between Charlestown and Havre de Grace, by being actively engaged in making said preparations, as I was their principal assistant at the time on the work they were then executing in Delaware, and had the whole charge during their absence; I am confident that the plaintiffs (from my familiarity with their business) had no work of any description in Virginia at the time they were making preparations for the work between Charlestown and Havre de Grace, nor had they (the plaintiffs) until after the said work between Charlestown and Havre de Grace was taken from them; nor do I believe that they (the plaintiffs) had any work besides the one they were then executing in Delaware, except upon the same road between Baltimore and Havre de Grace, which was commenced and finished about the same time as the work in Delaware; as soon as the big job before

named was relet, one of the plaintiffs who had charge of the work in Delaware wrote to his brother, (the other plaintiff,) giving him information concerning the said work being taken from them, advising him to attend a letting on the James River and Kanawah canal, at Richmond, Virginia, which was to take place, according to the advertisement in the Richmond papers, soon after the reletting of said work, and from what I could learn from plaintiffs and others they obtained at that letting 5 sections.

According to my judgment, the work the plaintiffs were then engaged on in Delaware could have been completed with a force of twenty-five men and twenty horses and carts by the given time (I believe the 1st of July, 1836.) The plaintiffs were then engaged in New Castle county, Pencada hundred, Delaware, and on the same railroad between Baltimore and Havre de Grace, but the amount of force necessary to complete that work in time I am unable to say; as to the exact amount of horses, and carts, and men, engaged by the plaintiffs at that time on their different works I am unable to say; but, to the best of my knowledge, there were between seventy and seventy-five horses and carts, and between a hundred and 150 men actually engaged upon their work in Delaware. Independently of the amount of force actually engaged, there were at least one hundred horses and carts promised employment by the plaintiffs, as soon as the work could be started between Charlestown and Havre de Grace, that were in the immediate neighborhood of the work in Delaware; how many the other plaintiff engaged I am unable to say.

Answer to 2d cross interrogatory:

15th interrogatory. The plaintiffs engaged the following managers, viz., Charles Howard, Merwin Prindle, M. B. Offunt, Isaiah Offunt, Otho Burness, N. G. Thomas, Alexander Williamson, John McGea, John Edds, M. Lanes, W. Holland, George A. Lepper, D. Jeanpience, Charles Howit, George M. Delaplaine, and, I believe, several others that I cannot call by name. They, the plaintiffs, engaged the following boarding masters, viz., George B. Meteer, Henry Vogler, John Schnell, Henry Milman, Archibald Martin, and several others whom I do not now recollect. The way I came to know said managers and boarding masters was, that I, as an agent of the plaintiffs, made the engagement with them; the amount of the provisions laid in by said boarding masters I am unable to say, but was told by them that they were prepared; and after said work was taken from plaintiffs, they (the boarding masters) complained to me very much in consequence of their having gone to so much expense for nothing.

Answer to 3d cross interrogatory:

57th interrogatory. I do not know what amount of excavation there was when the contract was made, but I am under the impression that there was more embankment than excavation.

R. P. DOWDEN.

Which being read and heard, it is ordered by the court here, in pursuance of the act of assembly, in such case made and provided, that a transcript of the record and proceeding thereunto relating be transmitted to Kent county court, to be held at Chestertown, in and for said county, on the third Monday of March next, and the same is accordingly transmitted.

Test: JAMES SEWALL,
Clerk.

And whereas afterwards, to wit, on the third Monday of October, to wit, on the 24th day of October, eighteen hundred and thirty-nine, the said Sebre Howard and Hiram Howard, by their attorneys aforesaid, and the said Wilmington and Susquehanna Railroad Company, by their attorneys aforesaid, filed in court here the following agreement, to wit:

Agreement.

HOWARD & HOWARD
vs.
The RAILROAD CO.

Action on the case removed from Cecil county court to Kent county court.

It is agreed that the suggestion, affidavit, and order for the removal of this cause be withdrawn, and that the case be re-instated in Cecil county court in the same manner as if the same had never been removed, and that it be placed on the trial docket of this term; and it is further agreed, that all testimony taken under any order or commission, passed or issued by Kent county court, or returned to Kent court, shall have the same effect, and be received in evidence in the same manner, as if taken under orders or commissions passed or issued by Cecil county court, and returned to Cecil court; provided said testimony was taken under commissions or orders of Kent or Cecil county courts, and then taken subject to all legal exceptions.

HY. STUMP, *Att'y.*
OTHO SCOTT, *Att'y.*

It is also agreed that this case be dismissed from Kent county court without prejudice.

HY. STUMP, *Att'y.*
OTHO SCOTT,
Att'y for def't.

October 24, 1839.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, by their attorneys aforesaid, and by order of the court here thereon, is further continued until the first Monday in April next.

At which said first Monday of April, in the year of our Lord 1840, came again into the county court here, as well the said Sebre Howard and Hiram Howard, by their said attorneys, as the said Wilmington and Susquehanna Railroad Company, by their said attorneys.

And the said plaintiffs, by their said attorneys, pray leave of the court here, according to the form of the act of assembly in such case made and provided, to amend their declaration aforesaid, and it is granted them.

Thereupon the said Sebre Howard and Hiram Howard, by their said attorneys, files in court here the following amended counts, to wit:

Amended declaration.

3d count. And the said plaintiffs further complain, that whereas after the said 15th October, and the said 1st November, the times fixed for the completion of the said work and labor designated in the said agreement on the 12th July, 1836, stated in the second count of this narr., the said plaintiffs, at the special instance and request of the said defendants, to wit, on the 2d day of November, 1836, at Wilmington, to wit, at Cecil county aforesaid, undertook and agreed, with the said defendants, to finish and complete all and singular the work and labor in the agreement aforesaid, which then remained unfinished and incomplete, at the prices and in the manner stipulated in the said agreement, and to do and perform the same within a reasonable time; and that the said defendants, in consideration thereof, promised and agreed to pay the said plaintiffs all that was then due them, and also for the said work and labor, at the prices stipulated in the said agreement, and to do and perform all and singular the covenants and agreements on the part of the said defendants to be done, as mentioned in the said agreement; and the plaintiffs further aver, that in consideration thereof they, the said plaintiffs, did proceed diligently and faithfully with the said work and labor, at the said instance and request of said defendants; and that while they were so employed, faithfully and diligently executing the said work and labor, and after the same had progressed considerably, the said defendants refused to do and perform the covenants and agreements on their part to be done and performed, and that said defendants, and their agents and engineers, refused to suffer and permit the said plaintiffs to proceed with the said work and labor, and to finish and complete the same, according to the terms of the said agreement; and the plaintiffs in fact say, that they were prevented from finishing and completing all the said work and labor in the manner stipulated in the agreement aforesaid, by the orders, directions, hindrance, and interference of the said defendants and their agents and engineers; and that they, the said plaintiffs, were ready and willing to have done and performed, and offered to do and perform, all and singular the said work and labor within a reasonable time, in the manner stipulated in the agreement aforesaid, of which said defendants then and there had notice, to wit, at the county aforesaid; but that the plaintiffs were prohibited and prevented from doing the said work and labor at the time and

in the manner aforesaid, by the refusal of the said defendants to observe and perform the covenants and agreements on their part to be done and performed, as set forth in the written agreement aforesaid, and by the interference and hindrance of said defendants and their agents and engineers, to wit, at the county aforesaid. By reason of which said unjust and fraudulent conduct on the part of the said defendants, the said plaintiffs were prevented from realizing the benefits, profits, and advantages which they would have derived from the completion of the said work and labor, and the observance of the said last mentioned agreement on the part of the said defendants; wherefore the said plaintiffs say they are injured and have suffered damages fifty thousand dollars.

4th count. And the said plaintiffs further complain, for that whereas on the 2d day of November, 1836, at the special instance and request of the defendants, they undertook and agreed with the defendants to finish and complete the work and labor upon section number nine, on the railroad of the defendants, which runs from Wilmington to the Susquehanna river, upon the following terms and conditions, that is to say, (here insert the agreement of the 12th day of July, 1836, leaving out the words, namely, "one mile from station number one, and the residue by November the first ensuing," and inserting in place thereof, "and within a reasonable time;") and that the said defendants, in consideration thereof, promised to pay for such work and labor the prices stipulated as aforesaid, and that, in pursuance of said agreement, did forthwith proceed with said work and labor up to the month of January, 1837, when they were prevented by the said defendants from further progressing in said work, and from finishing and completing the same according to the terms of said agreement in the first instance, because the said defendants refused to suffer their engineer to order or direct where the surplus earth, from the excavation on said section, over and beyond the amount of earth required for the embankment in the same section, should be placed, as they were bound to do by the said agreement; and afterwards, in the same month, fraudulently and illegally entirely stopped the said plaintiffs, and prevented them from going on with and completing the same, and afterwards gave the work to somebody else, by which the said plaintiffs were prevented from finishing and completing their said agreement.

And the said plaintiffs further aver that if they had been permitted to go on with and finish the said work under said contract, as they offered to said defendants and intended to do, they would have made large profits, to wit, fifty thousand dollars; whereas by the said conduct of the said defendants, they not only lost the said profits, but were put to other losses and expenses by being left in the possession of a large force of men and materials, horses and carts, which they had got together for the purpose of completing said work, by reason whereof said plaintiffs have sustained further damage to the amount of ten thousand dollars, and therefore the said plaintiffs say the[y] are damaged to the amount of sixty thousand dollars.

4584.

5th count. And whereas, also, the said defendants afterwards, to wit, on the first day of August, 1837, at the county aforesaid, were indebted to the said plaintiffs in the further sum of fifty thousand dollars, for the work and labor, care and diligence, of the said plaintiffs before that time done and performed in and about the business of the said defendants, and for them and at their special instance and request; and also for divers materials and other necessary things by the said plaintiffs before that time found and provided, and applied in and about that work and labor for the said defendants, and at their like special instance and request; and being so indebted, the said defendants in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, undertook and promised the said plaintiffs to pay them the last mentioned sum of money. Nevertheless the said defendants, not regarding their said promises and undertakings, but although often requested so to do by the said plaintiffs, have not yet paid the said sum of money, or any part thereof, but refuse so to do, to the damage of the said plaintiffs in the sum of fifty thousand dollars.

6th count. Quantum meruit to de added.

The following papers were also filed, to wit:

Commission to Ohio to take testimony.

Sebre Howard & Hiram Howard
vs.
The Wilmington and Susquehanna Railroad Company.

Kent county court. Commission to take testimony, &c.

Kent county, *State of Maryland, to wit:*

The State of Maryland, to John C. Vaughan, Edward P. Cranch, Nicholas Longworth, and Samuel Findley, gentlemen, greeting:

[seal.] Be it known that *your* appointed commissioners to examine witnesses in a cause depending in Kent county court, between Sebre Howard and Hiram Howard, trading under the firm of S. & H. Howard, plaintiffs, and the Wilmington and Susquehanna Railroad Company, defendants.

Therefore you, or any three or two of you, are requested, having first taken the oath hereunto annexed, and also administered the annexed oath to the person whom you shall appoint as clerk to attend the execution of this commission, that, at such time and place as to you, or any three or two of you, shall seem convenient, you cause to come before you, or any three or two of you, all such witnesses as shall be named and produced to you, or any three or two of you, by either the plaintiffs or defendants, and that you, or any three or two of you, examine them upon their corporal oaths, to be by you, or any three or two of you, administered upon the holy evangely of Almighty God, touching their knowledge or remembrance of any thing that may relate to the cause aforesaid; and after having reduced the depositions of the

witnesses, so taken by you, or any three or two of you, into writing, you send the same with this commission, closed under your, or any three or two of your, hands and seals, to the said court, with all convenient speed.

Witness the honorable Ezekiel F. Chambers, chief judge of our said county court, the 18th day of March, 1839. Issued 13th day of August, A. D. 1839.

JOSEPH N. GORDON,
Clerk Kent county court.

(*Commissioner's oath.*)

You shall, according to the best of your skill and knowledge, truly, faithfully, and without partiality to any or either of the parties, to take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission hereunto annexed, upon the interrogatories now, or which may hereafter, before the said commission is closed, be produced to and left with you by either party, so help you God.

EDWARD P. CRANCH,
JNO. C. VAUGHAN.

Sworn to and subscribed before me, mayor of the city of Cincinnati, State of Ohio, Hamilton county, this 12th day of March, 1840.

[SEAL.] SAMUEL W. DAVIES, *Mayor.*

(*Clerk's oath.*)

You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take, write down, and transcribe the depositions of all and every the witness and witnesses produced before, and examined by, the commissioners, or any three or two of them, named in the commission hereunto annexed, as far forth as you are directed and employed by the said commissioners, or any three or two of them, to take, write down, and transcribe the said depositions, or any of them, so help you God.

T. O. PRESCOTT.

Sworn and subscribed before us, this 11th day of March, 1840.

EDWARD P. CRANCH,
JNO. C. VAUGHAN.

SEBRE HOWARD & HIRAM HOWARD
vs.
WILMINGTON and Susquehanna Railroad Company.

Interrogatories to be propounded to John McMurray, a witness to be produced, sworn, and examined, on the part of the plaintiffs, before the commissioners, pursuant to the commission hereunto annexed.

Plaintiffs' interrogatories.

Interrogatory first. Are you acquainted with the parties in the above entitled cause, and how long have you known them or either of them?

4505.

2d interrogatory. Were you, or were you not, employed as a manager, by S. & H. Howard, on the ninth section of the Wilmington and Susquehanna railroad, extending from station No. 191 to a wharf in the Susquehanna river; if yea, state when and how long you were so employed.

3d interrogatory. Have you, or have you not, had much experience upon works of this kind?

4th interrogatory. From your knowledge of works of this kind, what must it have cost the plaintiffs to grub and clear up for the railroad through Mr. J. Stump's woods?

5th interrogatory. Had, or had not, the plaintiffs a large force employed upon the 9th section, between Mill creek and the wharf on the Susquehanna river, at the time an injunction was laid by John Stump upon that end of the work? State the amount of force employed at the time.

6th interrogatory. Was or was it not sufficient to finish the embankment at the river (or as much as was placed there in all by the plaintiffs) by the first of November, 1836?

7th interrogatory. Were or were not the plaintiffs compelled to remove their force from that end of the section on account of the aforesaid injunction? If so, state the length of time they were so employed.

8th interrogatory. After the before mentioned injunction was removed, and the plaintiffs permitted to return to that end of the section, to recommence operations, had or had not the plaintiffs a great difficulty in opening the surface of the cut by ploughing; was or was not ploughing the usual way of working; and was or was not the surface baked excessively hard by the sun in consequence of its lying exposed so long?

9th interrogatory. How long was it before the plaintiffs could get the surface broken, so as to work their force to an advantage, after they were permitted to commence upon that end?

10th interrogatory. Was or was there not a large number of plough castings broken in consequence of the whole surface of the cut at the end of the work being exposed so long to the sun, and their having to open by ploughing? If so, state the number each day.

11th interrogatory. From your knowledge of work of this kind, what must it have cost the plaintiffs extra on account of the surface being baked or dried by its long exposure to the sun? State, also, how much time was lost in getting the work in as good condition as it was in previous to the laying the injunction, before mentioned, in consequence of its being dried as before stated.

12th interrogatory. Were or were not the plaintiffs obliged to pick the earth of the cut, instead of ploughing it, from some time in November until the 6th of January, to furnish earth for the embankment in the river Susquehanna? State the cause, if any, why the plaintiffs had to pick instead of ploughing it.

13th interrogatory. From your knowledge of this kind of work, what

must it have cost the plaintiffs extra on account of having the surface of the earth frozen, while they were making the embankment in the river out to the wharf, in the month of November and December.

14th interrogatory. Have you, or have you not, heard the engineers say that the embankment must be carried out to the wharf, let it cost what it would, to prevent the wharf, and also the embankment, from being swept away by the ice and high waters in the spring?

15th interrogatory. Had or had not the plaintiffs every prospect of finishing the grading of one and a half miles of the ninth section, commencing at station No. 191, and running towards the river Susquehanna, by the first of October, 1836, before the injunction was laid upon the west end of the section?

16th interrogatory. State the cause, if any, why the one and a half miles alluded to in the preceding interrogatory was not finished by the 1st of October, 1836.

17th interrogatory. State the disadvantage, if any, to the plaintiffs in having to work upon the eastern end of the section the force which was boarded at the western end during the time the western end was suspended on account of the injunction aforesaid.

18th interrogatory. State the amount of time lost, per day, by each man, horse and cart, going to and from their work; state the distance at which they were boarding from the work, the number of hands, horses and carts, employed, the length of time so employed, and also the wages they received.

19th interrogatory. Were or were not the plaintiffs intending to have the embankment through Mr. Cowden's woods made entirely of the earth taken from the cut of the road through Mr. John Stump's woods and fields? State why they did not carry out their plan of building said embankment.

20th interrogatory. Were or were not the plaintiffs hindered in point of time from finishing the one and a half miles, commencing at station No. 191, and running towards the Susquehanna river, by certain obstructions and additions to the amount of work, and what were these obstructions and additions on the one and a half miles, which was to have been finished by the 1st of October, 1836?

21st interrogatory. Did or did not the plaintiffs make every effort in their power to keep the cut open, so as to continue the work through the winter; what means did they employ to effect it? State the time when the plaintiffs stopped operations on the 9th section; and what were the efforts to continue it; and what did they tell their men with regard to further operations.

22d interrogatory. From your knowledge of this kind of work, for how much per cubic yard could the plaintiffs have moved the earth from Mr. John Stump's woods to the embankment on the river Susquehanna, upon a temporary railroad, such as the plaintiffs were preparing to make, in a season of the year when the ground was not frozen?

23d interrogatory. What was the effect upon the laborers being kept out of their pay, for December and part of January, until late in Janu-

ary, and their being thrown out of employment altogether by the work being taken from the plaintiffs?

24th interrogatory. Did or did not the plaintiffs, after the work was taken from them, offer to aid all the laborers in going with their horses and carts to Virginia, upon a work which the plaintiffs had there on the James river and Kanawah canal?

25th interrogatory. State their reasons, if any, why the laborers would not go, or what were the reasons they assigned for not going, as requested by the plaintiffs.

26th interrogatory. Were or were not the plaintiffs popular or in good credit with the laboring class, in conducting all former jobs of public or similar work, as far as you were acquainted with them? Had the plaintiffs or not any difficulty in getting any number of laborers, horses and carts, to execute any former work they had undertaken?

27th interrogatory. To what extent was the reputation of the plaintiffs injured with the laboring class, in consequence of the ninth section of the Wilmington and Susquehanna railroad being taken from them, and all their laborers thereby thrown idle in the middle of winter.

28th interrogatory. Did you or did you not hear the laborers threaten to seize the goods of the store, kept by the plaintiffs, if they returned to the section without money to pay them; and from what you could learn from them, do you or do you not think the lives of the plaintiffs would have been in jeopardy, provided they could not have raised money to pay the laborers?

29th interrogatory. Did or did not the plaintiffs pay the laborers in full for their services?

30th interrogatory. Do you know any other matter or thing appertaining to this cause, in favor of or against either party? If yea, declare the same fully.

JAMES A. PEARCE,
Att'y for plff's.

SEBRE HOWARD and Hiram Howard
vs.
WILMINGTON and Susquehanna Railroad Company.

Kent county court. Cross interrogatories to be propounded to John McMurray, a witness to be produced, sworn, and examined on the part of plaintiffs.

Cross interrogatories.

First cross interrogatory. Where and with whom are you employed, and what is your occupation since you ceased to be the agent or manager of the plaintiffs, on the 9th section of the Wilmington and Susquehanna railroad.

2d cross interrogatory. If you answer the 10th interrogatory in chief affirmatively, state [what] was the nature of the soil; whether you were actually engaged yourself in ploughing; and how you know the manner and cause in and by which the ploughs were broken.

must it have cost the plaintiffs extra on account of having the surface of the earth frozen, while they were making the embankment in the river out to the wharf, in the month of November and December.

14th interrogatory. Have you, or have you not, heard the engineers say that the embankment must be carried out to the wharf, let it cost what it would, to prevent the wharf, and also the embankment, from being swept away by the ice and high waters in the spring?

15th interrogatory. Had or had not the plaintiffs every prospect of finishing the grading of one and a half miles of the ninth section, commencing at station No. 191, and running towards the river Susquehanna, by the first of October, 1836, before the injunction was laid upon the west end of the section?

16th interrogatory. State the cause, if any, why the one and a half miles alluded to in the preceding interrogatory was not finished by the 1st of October, 1836.

17th interrogatory. State the disadvantage, if any, to the plaintiffs in having to work upon the eastern end of the section the force which was boarded at the western end during the time the western end was suspended on account of the injunction aforesaid.

18th interrogatory. State the amount of time lost, per day, by each man, horse and cart, going to and from their work; state the distance at which they were boarding from the work, the number of hands, horses and carts, employed, the length of time so employed, and also the wages they received.

19th interrogatory. Were or were not the plaintiffs intending to have the embankment through Mr. Cowden's woods made entirely of the earth taken from the cut of the road through Mr. John Stump's woods and fields? State why they did not carry out their plan of building said embankment.

20th interrogatory. Were or were not the plaintiffs hindered in point of time from finishing the one and a half miles, commencing at station No. 191, and running towards the Susquehanna river, by certain obstructions and additions to the amount of work, and what were these obstructions and additions on the one and a half miles, which was to have been finished by the 1st of October, 1836?

21st interrogatory. Did or did not the plaintiffs make every effort in their power to keep the cut open, so as to continue the work through the winter; what means did they employ to effect it? State the time when the plaintiffs stopped operations on the 9th section; and what were the efforts to continue it; and what did they tell their men with regard to further operations.

22d interrogatory. From your knowledge of this kind of work, for how much per cubic yard could the plaintiffs have moved the earth from Mr. John Stump's woods to the embankment on the river Susquehanna, upon a temporary railroad, such as the plaintiffs were preparing to make, in a season of the year when the ground was not frozen?

23d interrogatory. What was the effect upon the laborers being kept out of their pay, for December and part of January, until late in Janu-

ary, and their being thrown out of employment altogether by the work being taken from the plaintiffs?

24th interrogatory. Did or did not the plaintiffs, after the work was taken from them, offer to aid all the laborers in going with their horses and carts to Virginia, upon a work which the plaintiffs had there on the James river and Kanawah canal?

25th interrogatory. State their reasons, if any, why the laborers would not go, or what were the reasons they assigned for not going, as requested by the plaintiffs.

26th interrogatory. Were or were not the plaintiffs popular or in good credit with the laboring class, in conducting all former jobs of public or similar work, as far as you were acquainted with them? Had the plaintiffs or not any difficulty in getting any number of laborers, horses and carts, to execute any former work they had undertaken?

27th interrogatory. To what extent was the reputation of the plaintiffs injured with the laboring class, in consequence of the ninth section of the Wilmington and Susquehanna railroad being taken from them, and all their laborers thereby thrown idle in the middle of winter.

28th interrogatory. Did you or did you not hear the laborers threaten to seize the goods of the store, kept by the plaintiffs, if they returned to the section without money to pay them; and from what you could learn from them, do you or do you not think the lives of the plaintiffs would have been in jeopardy, provided they could not have raised money to pay the laborers?

29th interrogatory. Did or did not the plaintiffs pay the laborers in full for their services?

30th interrogatory. Do you know any other matter or thing appertaining to this cause, in favor of or against either party? If yea, declare the same fully.

JAMES A. PEARCE,
Att'y for plff's.

SEBRE HOWARD and Hiram Howard
vs.
WILMINGTON and Susquehanna Railroad Company.

Kent county court. Cross interrogatories to be propounded to John McMurray, a witness to be produced, sworn, and examined on the part of plaintiffs.

Cross interrogatories.

First cross interrogatory. Where and with whom are you employed, and what is your occupation since you ceased to be the agent or manager of the plaintiffs, on the 9th section of the Wilmington and Susquehanna railroad.

2d cross interrogatory. If you answer the 10th interrogatory in chief affirmatively, state [what] was the nature of the soil; whether you were actually engaged yourself in ploughing; and how you know the manner and cause in and by which the ploughs were broken.

3d cross interrogatory. If you speak of any declarations of engineers, state the names of the engineers, the places and times where and when the declarations were made, and in whose presence, and as nearly as possible the very words used.

4th cross interrogatory. If you answer the 18th interrogatory in chief, state your means of knowledge; if from books, whose books, and by whom kept.

5th cross interrogatory. If you answer the 19th interrogatory in chief, state how you know the plaintiffs intended.

6th cross interrogatory. If you answer the 22d interrogatory in chief, state how you know that the plaintiffs were preparing to make a temporary railroad, and what were the preparations they made.

7th cross interrogatory. If you answer the 29th interrogatory in chief affirmatively, state your means of knowledge; were you present at the time of payment?

The fourth, six, seventh, ninth, eleventh, thirteenth, fifteenth, sixteenth, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, and twenty-eighth interrogatories in chief are objected, and also the twenty-first is objected to, as to the inquiry about the plaintiffs' declarations to, and conversations with, their men.

JOHN C. GROOM,
Att'y for defendants.

KENT COUNTY COURT, MARYLAND, *sc.*

I hereby certify that the aforegoing interrogatories and cross interrogatories are truly and correctly copied from the originals filed in the clerk's office of Kent county court.

In testimony whereof I have hereunto subscribed my name and affixed the seal of my office, this 13th day of August A. D. 1839.
[SEAL.] JOSEPH N. GORDON, *Clerk.*

SEBRE HOWARD and Hiram Howard
vs.
WILMINGTON and Susquehanna Railroad Company.

Kent county court, Maryland.—Commission to take testimony.

Deposition taken in the above cause on the behalf of the plaintiffs, on the 11th and 12th days of March, 1840, before John C. Vaughan and Edward P. Cranch, two of the commissioners named in the commission, from Kent county court, Maryland, hereto attached, at Cincinnati, Hamilton county, State of Ohio, pursuant to the commission and interrogatories annexed.

Deposition of Jno. McMurray.

John McMurray, of lawful age, being duly sworn, first on the holy evangely of Almighty God, deposes and says, in answer to the above interrogatories and cross interrogatories, as follows:

1st. In answer to the first interrogatory on the part of the plaintiffs witness deposes as follows: I have known the plaintiffs for five or six years.

2d. In answer to the second interrogatory of plaintiffs witness says: I was; I entered into their employment some time in July, 1836, and continued until January, 1837.

3d. I have had at least eight years experience on public works principally of this kind; in answer to the third interrogatory.

4th. In answer to the fourth interrogatory: It must have cost at least one thousand dollars at the lowest calculation.

5th. In answer to the fifth interrogatory: They had at the time employed between the woods and Mr. Stump's and the wharf, between seventy-five and eighty men, and about 45 hired carts and horses, besides an eight-horse plough team, which force was engaged in making up the embankment in the river Susquehanna.

6th. In answer to the sixth interrogatory witness says: It was, and before that time.

7th. In answer to the seventh interrogatory: In order to keep the force employed, the plaintiffs were obliged to work them on the eastern end of the section about six weeks, during which time the western end of the section was suspended on account of an injunction laid by Mr. John Stump, to prevent the embankment being carried into the river.

8th. To the eighth interrogatory of plaintiffs he says: They had a great difficulty in opening the surface of the cut on account of its being baked excessively hard by the sun, in consequence of its being exposed to the action of the sun during the suspension, it being stiff brick clay.

9th. To the ninth interrogatory he says: It was at least two weeks before the plaintiffs could keep the force more than half busy, on account of the surface being so hard baked by the sun, after they commenced operations on the western embankment after the injunction was removed, or the plaintiffs were directed to recommence by the engineers.

10th. To the tenth interrogatory of plaintiffs he says: There was a large number of castings broken in consequence of the cut being baked by the sun; as I before stated it was of a stiff brick clay; there was as high as three castings broken in a single day.

11th. To the eleventh interrogatory of plaintiffs he says: It must have cost the plaintiffs at least six hundred dollars extra on account of the before mentioned disadvantage of the surface being baked by the sun during the suspension before named; as to the time lost, I can only say the force was not kept more than half employed for two weeks in consequence of the before mentioned disadvantage.

12th. To twelfth interrogatory of plaintiffs he says: The plaintiffs discontinued ploughing on account of the work becoming frozen too deep to plough, some time about the middle of November, and had the earth to pick until they discontinued altogether, I think between the sixth and the middle of January, 1837.

13th. To the thirteenth interrogatory of plaintiffs he says: It must

have cost the plaintiffs nearly, if not quite, double what it would to have executed it during the time of the suspension on account of the aforesaid injunction; part of the time they had the earth frozen two feet thick, and a part of it to blast; that portion of it must have cost upwards of one dollar per cubic yard; I believe the whole that was executed in the month of November and December cost the plaintiffs fifty cents per cubic yard.

14th. To the fourteenth interrogatory he says: I do not recollect hearing the engineer telling the plaintiffs so, but I have frequently heard the plaintiffs say that it must be done let it cost what it would, in order to secure the embankment and wharf, and the plaintiffs have frequently said that was the engineer's order.

15th. To the fifteenth interrogatory he says: The plaintiffs had every prospect of finishing the ninth section, excepting filling in the masonry, which was not done in time from station No. 191 to five or six hundred feet below Mill creek bridge, before the 15th of October, 1836, before the injunction was laid by John Stump upon the embankment in the river.

16th. To sixteenth interrogatory he says: One very important reason why it was not graded by the 15th of October was, that the masonry was not finished in time; another reason was, the embankment through Mr. Cowden's field was increased to double width instead of single, making several thousand cubic yards of embankment to make, at a long haul, more than was originally laid out at the time the plaintiffs took the work.

17th. To the 17th interrogatory witness says: The disadvantage to the plaintiffs was in loss of time going to and from their meals of all their force employed.

18th. To the 18th interrogatory he says: The whole force averaged a loss of time of at least two hours per day, going to and from their meals; the average distance was from one and a half to two miles; the average number of men employed, according to the best of my judgment, was from ninety to one hundred men, and about sixty horses and carts were so employed for about six weeks. Hands were paid by the plaintiffs during the time one dollar and twelve and a half cents per day; horses and carts one dollar and fifty cents.

19th. To the 19th interrogatory he says: I understood from them *they were* the reasons why they did not carry out their plan of making up the embankment through Mr. Cowden's woods and Mr. Stump's fields and woods *was*, there was a culvert laid out to be built by the engineer in Mr. Cowden's woods, which was not in the plan of the work at the time the plaintiff undertook the work; it being in a low marshy spot, the embankment could not well be built beyond the culvert location without the culvert being built, which was not built in time, the consequence that they had the earth beyond the culvert to haul a long distance for said embankment.

20th. To the 20th interrogatory he says: This interrogatory was answered in the 16th and 19th.

21st. To the 21st interrogatory he says: They did all that was possible to do after they were instructed by Captain De la Roche not to put any more earth on the embankment; they moved their force into Mr. Stump's woods, this being about the first of January, 1837; the earth at that time had become frozen from one to two feet thick; the force was kept on to a great disadvantage in endeavoring to open the surface with picks, until between the sixth and ninth of January, and then were obliged to discontinue on account of the ground having become frozen at least two feet thick; before the plaintiffs discontinued operating, when it was costing them at least one dollar per cubic yard, they were only permitted to waste the black soil on Mr. Stump's land, and that did not reach any deeper than the ground was frozen; consequently they had no opportunity of descending below the frost, and working the cut by undermining, which would have been the proper plan had they had opportunity of wasting or disposing of the material so excavated; after the plaintiffs were compelled to discontinue, as before stated, they told their men that if they would still continue on the section, that then the plaintiffs would start the work as soon as it was possible to open it.

22d. To the 22d interrogatory he says: I am satisfied that the earth that remained to be excavated in Mr. Stump's woods, after it had been grubbed and prepared as it was by the plaintiffs, could have been excavated and removed from the woods to the embankment in the river, upon a temporary railroad which the plaintiffs were intending to lay down, (or so they told me at the time,) for eighteen cents per cubic yard in a proper season for doing that kind of work, namely, when the earth was not frozen.

23d. To the 23d interrogatory he says: It produced a great deal of excitement and dissatisfaction on the part of the laborers.

24th. To the 24th interrogatory he says: They did.

25th. To the 25th interrogatory he says: The reasons were assigned for not accepting the offers from the plaintiffs of going on to their work on James River and Kanawah canal, or a large portion of them, that they had been disappointed by the plaintiffs the year previous, by the plaintiffs promising them employment; the plaintiffs stating to them that they had all of the grading of the railroad to do between Charlestown and river Susquehanna, and it turning out that they had none of it to do; and then, again, the plaintiffs promising them employment through the ensuing winter upon the ninth section, and again being thrown idle in the middle of the winter, caused them to lose all confidence in the plaintiffs' promises, and they could seek employment elsewhere.

26th. To the 26th interrogatory he says: They were, and there was none within the circle of my acquaintance more so. They could raise a force quicker (and continue them in their employ longer) than any other contractors that I ever was acquainted with, until disappointing them two years in succession before alluded to.

27th. To the 27th interrogatory he says: They were much injured in reputation in prosecuting subsequent works. I have frequently heard

the laborers say, that the plaintiffs had injured them very much by their promises not proving true; that they had followed them, the plaintiffs, from other works that they could have done well on; they had also been advised by their friends who recommended the plaintiffs in the highest terms as good contractors to work for, that the plaintiffs had promised them employment two years in succession, and disappointed them both times; that they never should have the opportunity of doing it again. I should not myself have disappointed the laboring class in that season of the year, by throwing them idle, with all the attending disadvantages of loss of reputation by so doing; or, in other words, be placed as the plaintiffs were in having the work taken from them on account of reputation alone, for ten thousand dollars, were I pursuing public works by contract as the plaintiffs were.

28th. To the 28th interrogatory he says: The laboring class had become so much dissatisfied on account of not being paid for the month of December to that late period in January, (it being about the 20th before they were settled with,) and it being reported, whilst the plaintiffs were away for their estimate, that the work was declared abandoned by the company, I am well satisfied that the plaintiffs could not have returned to the section openly, without money to pay the laborers, without their lives being highly jeoparded, and their store and other property being torn from them. I would not myself have been placed at the mercy of the laborers, without money to pay them at the winding up of the concern, for the whole cost of the railroad from Philadelphia to Baltimore.

29th. To the 29th interrogatory he says: I believe they did; I was in the office most of the time during the last settlement, and all that applied for their money had it paid them; I heard no complaint from the men for not being paid, and I most unquestionably should, had it been otherwise; this was about the 20th of January, 1837.

30th. To the 30th interrogatory he says: The plaintiffs were much hindered on account of having the earth from the embankment through Mr. Cowden's woods, (up to a certain culvert,) to haul around Mill creek bridge site, having the distance considerably increased; and also to descend with the loaded carts down to the bed of the creek, and to ascend again to the other embankment, thereby not being able to haul more than two-thirds of the load that they would have done, had they had an opportunity of continuing the embankment over the bridge, which they would have done had the bridge have been built in time; nearly all of this embankment was built in the month of September and the fore part of October from Mr. John Stump's field; the disadvantage of having to haul around the bridge site, and the stone and other materials placed there for building the bridge, was equal to having the whole amount of material for said embankment to haul three hundred feet further on a level, without any impediment on account of the bridge. There was a good many boulders and other stone in the section that the plaintiffs had to remove, over a cubic foot in size; some of them had to be blasted; I am satisfied that it cost the plaintiffs fully one thousand dollars.

Cross examination.

1st cross interrogatory: In answer to the first cross interrogatory, the witness further deposes and says: I am employed by Messrs. Dickinson & Holmes as a manager for brick making, for supplying the tunnel of the White Water and Cincinnati canal, in Hamilton county, Ohio; I have been employed a small portion of the time by the plaintiffs, since being employed on the ninth section before spoken of.

2d. To the 2d cross interrogatory he says: The soil was principally of stiff brick clay; I had an opportunity of seeing the operation of the plough team several times a day, but was not employed in holding the plough myself; I saw the plough in operation; I saw the quality of the clay; I saw the plough broke several times on account of the clay being baked so hard by the sun, as before spoken of.

3d. To the 3d cross interrogatory he says: I generally received my orders from the plaintiffs, and not from the engineers; I therefore do not recollect any particular conversation of the engineers with regard to the obstructions, &c.

4th. To the 4th cross interrogatory he says: I kept the number of hands, carts, and horses that I managed myself; I judged the whole number by securing them on the work daily and hourly, as worked by myself and other managers; I knew the price given by having the authority of hiring and discharging my own force; I have been frequently in the office during the paying off of the force, and knew what they were paid off at.

5th. To the 5th cross interrogatory the witness says: Because I received instructions from the plaintiffs from time to time in carrying out his plans; and as to the particular plan alluded to, I have frequently heard the plaintiff say, that he intended to make up said embankment from the cut through Mr. Stump's field and woods, and that would have been the best way of making said embankment in my opinion.

6th. To the 6th cross interrogatory he says: I understood from the plaintiff that he had already made arrangements for the timber at the time he stopped operations.

7th. To the 7th cross interrogatory he says: I was present most of the time, as I had nothing else to do on account of the work being suspended.

JOHN McMURRAY.

(Countersigned.)
T. O. PRESCOTT,
Clerk to the commission.

STATE OF OHIO, *Hamilton county*,
CITY OF CINCINNATI, *sct.*

We, the subscribers, John C. Vaughan and Edward P. Cranch, two of the commissioners herein named, do hereby certify, that in a cause depending in Kent county court, wherein Sebre Howard and Hiram Howard are plaintiffs, and the Wilmington and Susquehanna Railroad Company are defendants, in which cause a commission hereto attached

was received by us to take testimony, having taken the oath hereto annexed, and also administered the annexed oath to Thomas O. Prescott, whom we appointed our clerk to attend the execution of this commission, did cause to come before us John McMurray, a witness produced to us by the plaintiffs, on the 11th day of March, A. D. 1840, at the office of Thos. O. Prescott, in the city, county, and State aforesaid, viz., at Cincinnati aforesaid, and did then and there examine said witness upon his corporal oath, by us administered on the holy evangely of Almighty God, touching his knowledge or remembrance of any thing that might relate to the cause aforesaid, to testify the truth, the whole truth, and nothing but the truth, propounding unto him each and every of the interrogatories and cross interrogatories hereto annexed, and recording his answers thereunto, and witnessing that he subscribed his name thereto. We also certify, that the said testimony was taken down, written, and recorded as above, by our said clerk, Thomas Oliver Prescott, at the above time and place in our presence; and we have annexed these papers, to wit, the said commission, interrogatories, oaths, and depositions together, and enclosed, sealed up, and directed the same to the said Kent county court, Maryland, as by the said commission directed.

The commissioners allow the following charges, and certify the same to have been paid by the plaintiffs, viz:

Fees of 2 commissioners, 2 days - - - -	$20
Fees of mayor for swearing commissioners - - -	1
Witness' fees, 2 days - - - - -	1 25
Clerk's fees - - - - - - -	8
Postage, $1 50 each way - - - - -	3
Thirty-three $\frac{25}{100}$ dollars.	$33 25

Witness our hands and seals, this 12th day of March, in the year of our Lord eighteen hundred and forty.

JOHN C. VAUGHAN, [SEAL.]
EDWARD P. CRANCH. [SEAL.]

The following notice was also filed, to wit:

To JOHN C. GROOME, esq.:

I hereby notify you that as counsel for Sebre and Hiram Howard against the Susquehanna and Wilmington Railroad Company, depending in Kent county court, I shall proceed to take the testimony and deposition of James P. Stabler, to be used for the said Sebre and Hiram Howard against said Susquehanna Railroad Company. The said deposition will be taken at the house of the said James P. Stabler, in Montgomery county, Maryland, John Cook and Leonidas Wilson, or one of them, as commissioners of Montgomery county, on Monday the

second day of September next, at the hour of eleven o'clock in the forenoon, at which time and place you may attend if you see fit.

J. A. PEARCE,
Att'y for S. & H. Howard.

The clerk of Kent county court will send a copy of the notice within to John C. Groome, esq., at Elkton, Cecil county, Maryland, and also copies of the same to John Cook, at Rockville, Montgomery county, and Leonidas Wilson, of Clarksburg, Montgomery county, and at the same time certify to these commissioners that such notice was sent to Mr. Groome in due time; that Mr. Groome is attorney for defendants, and that Elkton is his usual and proper post office.

J. A. PEARCE,
Att'y for S. & H. Howard.

And thereupon, on motion of the said Wilmington and Susquehanna Railroad Company, by their said attorneys, commission issued to Edward W. Gilpin and Thomas McDowell, esquires, of Wilmington, State of Delaware; which said commission, and the deposition and return of said commission are as follows, to wit:

Commission to Wilmington, Delaware.

THE STATE OF MARYLAND, *Cecil county, ss.*

To Edward W. Gilpin and Thomas McDowell, esq'rs, of Wilmington, State of Delaware, greeting:

Be it known that you are appointed commissioners to examine evidences in a cause depending in Cecil county court, between [SEAL.] S. & H. Howard, plaintiffs, and the Philadelphia, Wilmington, and Baltimore Railroad Company, defendants. Therefore you, or either of you, are requested, having first taken the oath hereunto annexed, and also administered the annexed oath to the person whom you shall appoint as clerk to attend to the execution of this commission, that at such time and place as to you, or either of you, shall seem convenient, you cause to come before you, or either of you, all such evidences as shall be named or produced to you, or either of you, by either the plaintiffs or defendant; and that you, or either of you, examine them upon their corporal oaths, to be by you, or either of you, administered upon the holy evangely of Almighty God, touching their knowledge or remembrance of any thing that may relate to the cause aforesaid; and that you, or either of you, cause notice to be given to the parties, or their attorneys, of the execution of this commission, before you execute the same; and having reduced the depositions of the witnesses so taken by you, or either of you, into writing, you send the same with this commission, closed up under your hand and seal, to the said county court, to be held at the court-house in Elkton, in and for Cecil county aforesaid, with all convenient speed.

Witness the honorable Ezekiel F. Chambers, chief judge of the said court, the 6th day of April, 1840.

Issued the 6th day of April, 1840. JAMES SEWALL, *Clk.*

Commissioner's oath.

You shall, according to the best of your skill and knowledge, truly, faithfully, and without partiality to any or either of the parties, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission hereunto annexed, upon the interrogatories now, or which may hereafter, before the said commission is closed, be produced to or left with you by either party. So help you God.

Clerk's oath.

You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take, write down, and transcribe the depositions of all and every the witness and witnesses produced before and examined by the , named in the commission hereunto annexed, as far forth as you are directed and employed by the said to take, write down, and transcribe the said depositions, or any of them, so help you God.

Defendant's interrogatory.

HOWARD & HOWARD
vs.
THE PHILADELPHIA, Wilmington, and Baltimore Railroad Company.

Action on the case, Cecil county court, April term.

Interrogatories to be put to William P. Brobson, a witness on the part of the defendant.

1st. Do you know the parties to the above suit; if yea, state how long.

2nd. Were you or not present when any contracts were made between the plaintiffs and defendant; and if yea, state whether the paper now shewn you, and marked A, is the contract between said plaintiffs and defendant; and state when and where it was executed, and by whom it was signed, sealed, and executed, and whether the said paper is the original contract between said parties.

3d. Are or are not the books shown to you the books of said defendant, and do they not contain all the entries in relation to the contracts and dealings between the plaintiffs and defendant, and all the entries of by-laws or resolutions in relation to any contracts or dealings between the said plaintiffs and defendant; and are there any other books containing entries relative to the transactions between the parties to this suit.

Lastly. State what entries in the books now shewn you, relative to the transactions between the said plaintiffs and defendant, were made by the authority of the defendant; and if you know any other matter or thing that will be advantageous to the defendant, state the same as fully as if you were especially interrogated thereto.

J. C. GROOME & OTHO SCOTT,
Attorneys for Defendant.

Additional interrogatory to be put to William P. Brobson on part of the defendant.

You are asked by plaintiffs to prove the execution of paper B; state also in relation thereto whether it is a duplicate original or a copy only of the original papers now shewn to you, and state all the circumstances connected with the execution of both papers.

OTHO SCOTT,
Defendant's Attorney.

Plaintiffs' cross interrogatory.

HOWARD
vs.
THE PHILADELPHIA, Wilmington, and Baltimore Railroad Company.

In Cecil county court, April term, 1840.

Cross interrogatories on the part of the plaintiffs, to be proposed by the commissioners to Wm. P. Brobson, a witness examined on behalf of the defendants.

1st. Look at the paper or contract now shewn you, marked B, and state if the signatures there of Sebre Howard and James Canby are in the genuine handwriting of the said Howard and Canby, and whether or not the said parties signed the same in your presence, and requested you to attest the same, and if you did witness it.

2nd. Were you or not at the date of execution of the said paper or contract, the secretary of the said Wilmington and Susquehanna Railroad Company; and was or was not the said James Canby, who signed the contract mentioned in the first interrogatory, at the time that he signed the said contract, the president of the said Wilmington and Susquehanna Railroad Company; and if yea, did he or did he not sign the said paper or contract in his charactor of president of the said Wilmington and Susquehanna Railroad Company?

HENRY STUMP,
ALBERT CONSTABLE,
Attorneys for Plaintiffs.

Plaintiffs' objections to the interrogatories proposed to Wm. P. Brobson.

HOWARD
vs.
THE PHILADELPHIA, Wilmington, and Baltimore Railroad Company.

In Cecil county court, April term, 1840.

Plaintiffs' objection to the interrogatories proposed by the defendant to William P. Brobson.

To the first interrogatory the plaintiffs object, because the same refers to a paper or supposed contract which is not exhibited or filed with the

said interrogatory, and without an inspection of which the plaintiffs cannot avail themselves of their right to cross examine said witness in relation thereto.

To the second and third interrogatories the plaintiffs object, because they seek to introduce as evidence in this cause the books and papers of the said defendants, and their accounts and statements of supposed transactions between the parties, and also the acts of said defendants in regard to the same, which are wholly inadmissible, and because the said third interrogatory is too general and indefinite to enable the plaintiffs to exercise their right of cross examination.

ALBERT CONSTABLE,
HENRY STUMP,
For Plaintiffs.

The plaintiffs, Howard, object to the additional interrogatory proposed on the part of the defendant, the Philadelphia, Wilmington, and Baltimore Railroad Company, to their witness, Wm. P. Brobson, because the same refers to another paper than that marked B, which the defendant have not exhibited, and in regard to which the plaintiffs cannot cross examine the witness, and because the said interrogatory is designed to elicit from the said witness facts or circumstances not relevant to the issues and inadmissible as evidence; and the plaintiffs object to any answer by the said witness to the said additional interrogatory, which introduces any fact or circumstance in any way conflicting with, or varying the terms and tenor of the said paper marked B, or any of the provisions and stipulations, and which interpolates upon or adds to the same.

ALBERT CONSTABLE,
HENRY STUMP,
Attorneys for plaintiffs.

Deposition of W. P. Brobson.

Deposition of William P. Brobson, esquire, a witness produced, sworn, and examined this eleventh day of April, in the year of our Lord one thousand eight hundred and forty, at the office of Edward W. Gilpin, attorney at law, in the city of Wilmington, in the State of Delaware, by virtue of a commission for the examination of witnesses in a certain cause now depending and at issue in Cecil county court, in the State of Maryland, between S. & H. Howard, plaintiffs, and the Philadelphia, Wilmington, and Baltimore Railroad Company, defendant, to us, whose names are hereto subscribed, directed, upon interrogatories to the said commission annexed.

William P. Brobson, esquire, of the city of Wilmington, in the State of Delaware, aged fifty-one years and upwards, being produced, sworn, and examined on the part of the defendants, deposeth and saith as follows, that is to say:

To the first interrogatory the deponent saith: That he knows Sebre Howard, one of the plaintiffs, and hath known him since about the month of June, in the year eighteen hundred and thirty-five; that he thinks he has seen Hiram Howard, the other plaintiff named in the said commission, but hath no acquaintance with him; the said deponent further saith, that he knows of the existence of the said company named in the said commission as defendant.

To the second interrogatory the deponent saith: That he hath been present when contracts have been made between the plaintiffs and the defendant, that is to say, two contracts for work to be performed in this State, and one for work to be performed in the State of Maryland; the contracts for work in this State were, first, a contract made in the year eighteen hundred and thirty-five, for grading the fifth section of the Wilmington and Susquehanna Railroad Company; and the second, by a contract made in the same year for grading a portion of the fourth section of said railroad; the third contract was for grading a part of the ninth section of the same road in Maryland. The paper now shown the deponent and marked A, is the written contract between the parties for part of section No. 9, in the State of Maryland; the said contract, marked A, was filled up at the directors' office, in the city of Wilmington, by deponent, on the day on which it bears date, and was then signed there by Sebre Howard and James Canby, president. The seal of the company was afterwards affixed at the treasurer's office, at which it was left, either on that day or within a few days. The stamped seal on the said contract, marked A, is the corporate seal of the Wilmington and Susquehanna Railroad Company, and the said seal was affixed to the said contract, marked A, by the authority of said board of directors of the said Wilmington and Susquehanna Railroad Company. Deponent further saith, that the said contract, marked A, was in the custody of deponent, as secretary of said company, from the time of its being signed by the said Sebre Howard and James Canby, as before stated, until some time last year, when it was delivered to one of the counsel of the company by deponent; and deponent further states, that at the time of the signing of the said contract, marked A, the question was asked the said Sebre Howard, whether he acknowledged the same to be his act and deed, and he said that he did; but no such question was put to the president of the said company, and he made no such acknowledgment when he signed it. The said contract, marked A, was the original contract between the said parties.

To the third interrogatory this deponent saith: That no books being produced, he cannot answer.

To the last interrogatory this deponent saith: That no book being produced, he cannot answer.

W. P. BROBSON,
E. W. GILPIN,
THOS. McDOWELL,
Commissioners.

Answers to cross interrogatories.

To the first cross interrogatory this deponent, looking at the paper, marked B, now shown to this deponent, saith: That the signatures thereto of Sebre Howard and James Canby, president, are in the genuine handwriting of the said Howard and Canby; said parties signed the same in his presence, and he signed the same as the subscribing witness.

To the second cross interrogatory this deponent answereth: That at the date of the execution of the said paper, he was the secretary of the Wilmington and Susquehanna Railroad Company; that the said James Canby, who signed the said contract mentioned in the first cross interrogatory, was, at the time he signed the same, the president of the said Wilmington and Susquehanna Railroad Company, and that he signed the same in his character of president of the said Wilmington and Susquehanna Railroad Company.

WM. P. BROBSON,
E. W. GILPIN,
THOS. McDOWELL,
Commissioners.

Answer to the additional interrogatory on the part of defendants.

To the said additional interrogatory this deponent saith: That the said papers, marked A and B, now shewn to this deponent, were both executed at the same time; that at the time of the signing of the said paper, marked B, the said Sebre Howard acknowledged it to be his act and deed. And this deponent further saith, that the want of the corporate seal of the said Wilmington and Susquehanna Railroad Company to the said paper, marked B, arose from the omission of this deponent; that the said paper, marked B, was delivered to the said Sebre Howard either on that day or about that time. But this deponent saith, that he had no authority from the board of directors to deliver the said paper, marked B, to the said Sebre Howard without the seal of the said Wilmington and Susquehanna Railroad Company being affixed thereto; the orders from the board of directors were, all contracts for grading should be executed under the corporate seal of the said company.

This deponent further saith, that in order to explain what may seem to be a failure of duty implied in the previous part of his answer to this interrogatory, that the delivery of the said paper, marked B, to the said Sebre Howard, without the corporate seal of the said company, was a mere inadvertence on his part, excusable from the fact that he did not consider it important whether the contractor had a copy, counterpart, or duplicate original, or not, inasmuch as deponent supposed that the only use they, the said contractors, had for such paper, was to know what work they had to do, and what their prices were; some contractors did not take either duplicate or copies of their contracts out of the office at all; deponent relied upon the contract kept in the office as the real contract. And deponent further saith, that the said Sebre Howard

delivered the said paper, marked A, as his deed; this delivery was made at the time of signing, and before the corporate seal was affixed.

W. P. BROBSON.

EDWARD W. GILPIN,
THOS. McDOWELL,
Commissioners.

To the honorable the judges of Cecil county court.

We, the undersigned, commissioners appointed by the within commission, hereby certify, that the execution of the said commission appears from the annexed schedule, attested by our hands; and we further certify that, after having duly taken the oath annexed to the said commission, and having delivered the annexed oath to Edward W. Gilpin, whom we appointed as our clerk, we did proceed, as in the said commission directed, to examine all witnesses produced before us by either of the said parties, in said commission mentioned, upon oath, touching their knowledge and remembrance of any thing relating to the cause aforesaid; and having caused notice to be given to the said parties, or their attorneys, of the execution of said commission before we proceeded to execute the same; and having reduced the depositions of the witnesses, so taken by us, into writing, have returned the same, with the said commission, closed under our hands and seals, to Cecil county court, certified under our hands and seals this eighth day of April, in the year of our Lord one thousand eight hundred and forty.

E. W. GILPIN, [SEAL.]
THOS. McDOWELL. [SEAL.]

And the said Wilmington and Susquehanna Railroad Company, by their said attorneys, defends the force and injury, when and so forth, and saith, that they did not assume upon themselves, in manner and form as the aforesaid Sebre Howard and Hiram Howard above against them have complained, and of this they put themselves upon the country; and the said Sebre Howard and Hiram Howard in like manner, &c.

Non assumpsit and issue.

Whereupon, for trying the issues aforesaid, it is ordered by the court here that twenty persons from the panel of petit jurors, returned to the court here by the sheriff of Cecil county, be drawn, by ballot, according to the act of assembly in such case made and provided.

And, thereupon, the twenty jurors being so drawn by ballot, and written upon two lists, one of which said lists is delivered to the counsel for the respective parties, and the counsel for each of the said parties having stricken out four persons from the said lists, thereupon the remaining twelve persons being called, come, that is to say—

Jury.

Lambert W. Biddle, James S. Spurier, Hugh Brown, William Knight, Jesse W. Fidgrove, Thomas White, George Benjamin, James Marnes, Charles Biles, John White, John S. Gary, and Edward M. Randler, who being empannelled and sworn, &c.

Whereupon, on motion of the said Sebre Howard and Hiram Howard, by their attorneys aforesaid, for leave to withdraw a juror for the purpose of amending the pleadings in this cause; and it appearing to the court here that the said pleadings are defective, the said Edward M. Chandler, one of the jurors of the jury within written, from the panel aforesaid is withdrawn by the court here, for the purpose of amending the pleadings aforesaid, and the rest of the jurors of that jury, from giving any verdict of and upon the premises within written; whereupon, on motion of the said Wilmington and Susquehanna Railroad Company, by their attorneys aforesaid, it is ordered by the court here that the said Wilmington and Susquehanna Railroad Company recover against the said Sebre Howard and Hiram Howard the sum of sixty-four dollars and fifteen cents, by the court here adjudged unto the said Wilmington and Susquehanna Railroad Company, for their costs and charges which they have sustained, laid out, and expended in, and about their suit in this behalf, since the last continuance of the plea aforesaid.

The following agreement was also filed:

Agreement.

HOWARDS
vs.
WILMINGTON and Susquehanna Railroad Company.

Cecil county court, April term, 1840.

It is agreed in this case that the plaintiffs reply generally to the several pleas filed by defendants, and under such replications, may give in evidence any matter which they could have replied specially to such pleas.

R. JOHNSON, *for plaintiffs,*
W. SCHLEY, *for defendants.*

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is further continued until the third Monday of October next.

At which said third Monday of October, in the year of our Lord eighteen hundred and forty, comes into the county court here, as well the said Sebre Howard and Hiram Howard, by their said attorneys, as the said Wilmington and Susquehanna Railroad Company aforesaid.

Rule.—Security for costs.

And thereupon, on motion of the said Wilmington and Susquehanna Railroad Company, by their attorneys aforesaid, and in pursuance of the act of assembly in such case made and provided, it is ruled by the court here, that the said Sebre Howard and Hiram Howard give security, on or before the second day of the next term, for all costs and charges that the said Wilmington and Susquehanna Railroad Company may be put to, in case the said Sebre Howard and Hiram Howard shall be nonsuited, or judgment be given against them in the plea aforesaid; or, in default thereof, that judgment of nonsuit will be entered against them; the same day is given to the said Wilmington and Susquehanna Railroad Company, then, &c.

Whereupon comes here into court, in his proper person, William Mackey, of the county aforesaid, and who, by the court here is considered good and sufficient, and undertakes, for the said Sebre Howard and Hiram Howard, that if the said Sebre Howard and Hiram Howard in the plea aforesaid shall be nonsuited, or judgment therein be given against them, then the said Sebre Howard and Hiram Howard shall pay unto the aforesaid Wilmington and Susquehanna Railroad Company all such costs and charges by them about their defence in this part sustained, as shall be adjudged unto the Wilmington and Susquehanna Railroad Company by the court here, or that he, the said William Mackey, will do the same for them.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties by their attorneys aforesaid, and by order of the court here thereon, is further continued until the first Monday of April next.

At which said first Monday of April, in the year of our Lord 1841, comes into the county court here as well the said Sebre Howard and Hiram Howard, by their attorneys aforesaid, as the said Wilmington and Susquehanna Railroad Company, by their attorneys aforesaid.

And the said Sebre Howard and Hiram Howard, by their attorneys aforesaid, declare anew against the said Wilmington and Susquehanna Railroad Company, in the plea aforesaid, in form following, to wit:

Amended nar.

STATE OF MARYLAND, *Cecil county, to wit:*

The Wilmington and Susquehanna Railroad Company were summoned to answer unto Sebre Howard and Hiram Howard, trading under the firm of S. & H. Howard, in a plea of trespass on the case, and so forth.

And thereupon the said Sebre Howard and Hiram Howard, trading under the firm of S. & H. Howard, by Henry Stump, their attorney, complain, for that whereas the said plaintiffs heretofore were employed in executing work and labor upon railroads and canals as their proper business, trade, and vocation, and whilst they were so employed, to wit, on the first day of October, 1835, at Wilmington, that is to say, at Cecil county aforesaid, at the request of the defendants, they, the said

plaintiffs, did make and enter into a contract or agreement with the said Wilmington and Susquehanna Railroad Company, to graduate the Wilmington and Susquehanna railroad between Charlestown and Havre de Grace, for twenty-four cents per cubic yard for excavating, grubbing, and purchasing land for embankment across the Principio valley included, the plaintiffs to purchase land to supply material for embankment when it could not be supplied from the road without making a haul of less than eleven hundred feet; all rock or other material that could not be removed without blasting to be left to the superintending agent, and if said agent and plaintiffs could not agree as to the price, the agent might relet this part of the work to any other person as specified in the former specifications of said company of the first and second divisions.

And the said plaintiffs aver, that after the making of the contract aforesaid, and in consideration thereof, to wit, on the day and year aforesaid, at the county aforesaid, and also in consideration that the said plaintiffs then and there undertook, and faithfully promised the defendants to fulfil, perform, and keep the said contract in all things on said plaintiffs' part to be fulfilled, performed, and kept, they the said defendants, undertook, and faithfully promised the said plaintiffs, to perform, fulfil, and keep the said contract in all things on defendants' part to be performed, fulfilled, and kept, to wit, on the day and year last aforesaid, at the county aforesaid.

And the said plaintiffs declare, that they have always, since the making of the said contract, been able, ready, and willing to perform, fulfil, and keep all things in said contract specified on their part to be performed, fulfilled, and kept, according to the true intent and meaning of the said contract, of which the said defendants had notice, to wit, on the day and year aforesaid, and often afterwards, at the county aforesaid.

And the said plaintiffs further say, that in consideration of the contract aforesaid, and of the promise and undertaking of the said defendants aforesaid, and for the purpose of performing all things in said contract on the part of said plaintiffs to be performed, they did advertise, proclaim, and publicly declare, that they would employ and hire all laborers as should apply to said plaintiffs to be hired for a reasonable compensation, to work upon the railroad in the contract stated between Charlestown and Havre de Grace; in consequence thereof, the plaintiffs were applied to by a great number of laborers to be hired, to wit, upon said railroad; and said plaintiffs did engage, hire, and pay a much larger number of laborers than they at that time had use for, or could work to advantage on the other jobs of work they were then engaged in completing, for the purpose of retaining said laborers in plaintiffs' employment, with their carts, oxen, and horses, so that the plaintiffs might be ready and prepared to commence, and vigorously prosecute to its completion, the graduating of the railroad in the agreement specified, whenever the said defendants were ready, and should give notice to the plaintiffs to begin to work upon it. And the said plaintiffs also aver,

that they employed a number of boarding masters to board the laborers to be employed on the said railroad in said agreement specified, many of whom purchased and provided large supplies of food, bedding, and cooking utensils.

And the plaintiffs engaged the services of a number of managers to superintend the work of the laborers, all of whom were retained by the said plaintiffs at great expense, until said defendants were ready for plaintiffs to begin grading the railroad between Charlestown and Havre de Grace, according to the agreement aforesaid; and the said plaintiffs also purchased a great number of implements and engines, and one hundred dozen shovels, for the purpose of fulfilling their agreement aforesaid, and were put to great expense, inconvenience, trouble, and delay, in and about satisfying, retaining, and compensating the laborers, workmen, and others, whom they had engaged, retained, and hired for the purpose of fulfilling their agreement as aforesaid.

And said plaintiffs further declare, that a great number of the laborers, workmen, and others they had engaged and hired for the purpose of fulfilling the agreement aforesaid, moved upon the line of the railroad between Charlestown and the Susquehanna river, and there constructed their houses or shantees, to be ready to commence their labors on said railroad, according to the agreement they had entered into as aforesaid with the said plaintiffs; and the said plaintiffs moved and transported all their necessary engines, implements, machinery, stores, and other effects, from the Baltimore and Port Deposit railroad to Frenchtown, in Cecil county, for the purpose of making ready to use the same on that part of the Wilmington and Susquehanna railroad in said agreement mentioned.

And the said plaintiffs say, they were then and there able, ready, and willing to commence and prosecute the work in the said agreement mentioned to its completion, according to said agreement; and said plaintiffs further aver, that they were hindered, and prevented, by the making of the agreement aforesaid, from attending to and bidding for the lettings and contracts upon other railroads and canals in various other places, which they otherwise might and would have attended to, and bid for, and engaged in, and thereby lost the opportunity of making large gains and profits from the same.

And the plaintiffs further aver, that although, after the time of making the agreement aforesaid, to wit, on the 12th day of July, in the year 1836, they entered into another contract or agreement in writing with the said defendants, to do all the grading of that part of section No. 9 of the same railroad mentioned in the first agreement, and which lies in the State and county aforesaid, and which extends from station No. 191 to the end of the piers and wharf in the river Susquehanna, opposite Havre de Grace, being a portion of the same railroad in the first agreement above stated. Nevertheless, the second agreement to grade section No. 9, from station No. 191, to the river as aforesaid, was made and entered into with the expressed determination and understanding on the part of the plaintiffs, and was so declared and expressed

by the plaintiffs to the said defendants at and before the time of entering into the said second agreement, that by entering into the said second agreement they, the said plaintiffs, did not waive, abandon, or rescind the said first agreement so made as aforesaid; but that notwithstanding the said second agreement, the said plaintiffs held and considered the said defendants liable and responsible to them for all the loss, injury, and inconvenience the said plaintiffs had suffered or been put to by the non-fulfilment on the part of the said defendants of all the matters and things in the said first agreement by them to be performed and observed, according to the true intent and meaning of the said first agreement, except only insomuch as said first agreement refers to that portion of said the railroad that is mentioned in said agreement; of all which premises the said defendants had notice, to wit, at the county aforesaid. Yet the said plaintiffs say, that the defendants, well knowing the premises, but contriving and wrongfully intending, artfully and deceitfully to defraud and injure the said plaintiffs, to wit, on the first day of December, 1835, at Cecil county aforesaid, wholly refused and declined to observe, perform, and fulfil any of the matters and things in the said first agreement specified on their part to be performed and fulfilled; and refused and declined any of the matters and things in their said promise and undertaking, but thereby craftily and subtly deceived the said plaintiffs, in this, viz., that the said defendants took the work of grading the railroad in the first agreement mentioned out of the hands of the said plaintiffs, by letting the same to other contractors and persons, without the consent of and against the will of said plaintiffs; and the said defendants, further disregarding the said first agreement, and their promises and undertakings, afterwards, to wit, on the first day of December, in the year 1835, at the county aforesaid, did not, nor would permit, or suffer the plaintiffs to begin, or proceed to complete the work on the railroad in the first mentioned agreement specified; and then and there wholly hindered and prevented them from so doing, and then and there wrongfully and unjustly discharged the plaintiffs from any performance or completion of their first said agreement, and promise, and undertaking; whereby the plaintiffs have been deprived of the profits, gains, and advantages which they otherwise might and would have derived and acquired from the completion of the work in the first agreement mentioned, to wit, at Cecil county aforesaid.

2d count. And whereupon the said Sebre Howard and Hiram Howard, trading under the firm of S. & H. Howard, by their attorney aforesaid, complain: For that, whereas the said plaintiffs were heretofore engaged in executing jobs of work and labor upon railroads and canals as their proper business and vocation, and the said Wilmington and Susquehanna Railroad Company were incorporated for the purpose, amongst other things, of constructing a railroad in the county aforesaid, and were bound by their charter to complete the construction of the said railroad in a given time mentioned therein, on pain of forfeiting their franchise; and said company were empowered, amongst other things therein, to

enter into contract with laborers and others for the purpose of constructing said road; and the said defendants, to wit, on the first day of October, in the year 1835, at Cecil county aforesaid, in consideration that the plaintiffs, at the special instance and request of the defendants, would undertake, promise, and agree to grade all that part of the Wilmington and Susquehanna railroad that lies betwixt Charlestown and Havre de Grace, or that was then laid out or contemplated to be made there in Cecil county, and would agree to execute the whole in a workmanlike manner, and according to the directions of the engineer, the defendants undertook and promised the plaintiffs that they would have the privilege of wasting the material of the cut, and of purchasing ground to supply the embankment over Principio valley, where it could not be supplied from the road without making a haul of less than eleven hundred feet; and the defendants undertook, and then and there promised the said plaintiffs, to permit and suffer them to grade the portion of the railroad that lies betwixt Charlestown and the Susquehanna river, and to pay the said plaintiffs 24 cents per cubic yard for common excavation; all rock excavated to be paid for at the estimate of the engineer; and the said plaintiffs aver that they, confiding in the promise and undertaking of the said defendants to grade all that portion of the Wilmington and Susquehanna railroad that lies between Charlestown and Havre de Grace in a workmanlike manner, according to the directions of the engineers, afterwards, to wit, on the first day of October, in the year, 1835, at the county aforesaid, and on the day and year last aforesaid, and divers days and times thereafter, did provide the necessary laborers, means, and instruments for the purpose of grading the road as aforesaid, and were put to great trouble and expense in and by engaging a great number of superintendents and laborers, and retaining them until the said defendants should be ready for plaintiffs to begin grading said railroad, and for purchasing a great number of shovels and other implements, and by moving and transporting all their necessary implements, machinery, and stores from the Baltimore and Port Deposit railroad to Frenchtown, for the purpose of using them in and about grading that portion of said railroad above mentioned. And the said plaintiffs further aver, that they have been able and willing, ever since the making of the said promise and undertaking of the defendants aforesaid, (until as hereinafter stated they were prevented from so doing by said defendants,) to begin and execute the grading of that portion of said railroad that lies betwixt Charlestown and Havre de Grace, in a workmanlike manner, and according to the directions of the engineer, whereof the said defendants then and there had notice, at Cecil county aforesaid; yet the said defendants, not regarding their said promise and undertaking in manner aforesaid made, but contriving and fraudulently intending to deceive and injure the said plaintiffs in this behalf, did not nor would permit or suffer the said plaintiffs to begin to grade the said portion of railroad, nor to complete the grading of the same, but wholly refused and neglected so to do; and on the contrary thereof, they, the said defendants, after the making of their said promise and

undertaking, and whilst the said plaintiffs were able and willing to begin and execute the grading of that portion of the railroad that lies betwixt Charlestown and Havre de Grace, in a workmanlike manner, according to the directions of the engineer, to wit, on the first day of December, in the year 1835, at the county aforesaid, wrongfully and unjustly, and without the license and consent, and against the will of the plaintiffs, they, the said defendants, let out the said portion of the railroad, and contracted for its graduation with other persons, and caused it to be graded by them, whereby the said plaintiffs were hindered and prevented from grading, or beginning to grade, said portion of the railroad aforesaid; nor did the said defendants pay the said plaintiffs 24 cents per cubic yard for common excavation on said portion of railroad, nor any part thereof, nor did they pay the said plaintiffs for the rock excavated according to the estimate of the engineer, although often requested so to do, but have hitherto wholly refused and neglected, and still refuse.

And the said plaintiffs also aver, that the said defendants wrongfully and unjustly discharged the plaintiffs from the performance and completion of their said promise and undertaking, whereby the said plaintiffs not only lost and were deprived of all the profits, benefits, and gains that might and would have accrued to them from grading the said portion of the railroad betwixt Charlestown and Susquehanna river, but also suffered and were put to great loss and expense of time and money in and about preparing to execute the grading of said railroad, and prevented from entering into contracts and engagements for jobs of work on other railroads and canals, amounting in the whole to a large sum of money, *scilicit*, at the county aforesaid.

3d count. And whereas, also, heretofore, that is to say, on the first day of October, in the year 1835, at Cecil county aforesaid, in consideration that the said plaintiffs at the special instance and request of the defendants would get ready and be prepared in a reasonable time then next ensuing the day and year last aforesaid, with laborers, implements, machinery, horses, and carts, to grade a certain portion of a railroad which the defendants were then engaged in constructing, the defendants then and there undertook and faithfully promised the plaintiffs to suffer and permit them to grade all that portion of the Wilmington and Susquehanna railroad (or by whatever other name the same may be called) that they were engaged in constructing, or intended to construct, betwixt Charlestown and the Susquehanna river, and to give the plaintiffs the privilege of wasting all material of the cut not required for the embankment, and permit them to purchase earth to supply the embankment over Principio valley, where it could not be supplied from the road without making a haul of less than eleven hundred feet, and if the plaintiffs could execute the whole in workmanlike manner, and according to the directions of the engineer, undertook and promised to pay them 24 cents per cubic yard for common excavation, and to pay the plaintiffs for all rock at the estimate of the engineer. And the said plaintiffs aver, that they, confiding in the said promise and under-

taking of the defendants, Dunlavet, on the said first day of October, in the year 1835, in the county aforesaid, and divers days and times thereafter, for the purpose of being ready and prepared with laborers, implements, machinery, horses and carts, to grade the portion of the said railroad above mentioned, did engage and hire a great many laborers, and horses and carts, all of which were kept and retained by plaintiffs in a state of readiness and at great expense, waiting for a long space of time for defendants to permit and suffer the plaintiffs to begin the grading of the portion of the railroad above specified; and said plaintiffs purchased a great number of necessary implements and machines, and one hundred dozen shovels, for the purpose of being ready to grade said railroad, and were put to great expense and trouble in and about moving and transporting their engines, machinery, and other effects from the Baltimore and Port Deposit railroad to Frenchtown, in Cecil county, for the purpose of being ready and prepared to commence grading the said portion of said railroad above mentioned, and to proceed with the completion of the same in a workmanlike manner, according to the directions of the engineer, so soon as the defendants might or should permit or suffer the plaintiffs to begin to grade the same. And the said plaintiffs further aver, that they were hindered and prevented by the promise and undertaking of said defendants made in manner and form as above stated, from undertaking and engaging in jobs of work on other railroads and canals, and lost thereby the opportunity of making large gains and profits from the same; of all which premises the defendants, on the day and year aforesaid, and often afterwards, at the county aforesaid, had notice. And the said plaintiffs aver, that from the time of making the said promise and undertaking of the said defendants, the plaintiffs were ready and willing, in a reasonable time and for a long space of time, *scilicit*, from the time of making said promise and undertaking until the first day of December, in the year 1835, at the county aforesaid, and offered to begin to grade all that portion of the railroad above mentioned, and to complete the same in a workmanlike manner, according to the directions of the engineer in a reasonable time; of all which premises the defendants, at the county aforesaid, on the said first day of October, and often afterwards, had notice. Yet the said plaintiffs in fact say, that the defendants contriving and wrongfully intending, to injure the said plaintiffs, did not, nor would, perform their said promise and undertaking in form aforesaid made, but totally disregarding the same, did not nor would permit or suffer the said plaintiffs to begin to grade that portion of the railroad above mentioned, betwixt Charlestown and the Susquehanna river, but wholly neglected and refused so to do; and on the contrary thereof they, the said defendants, after the making of the said promise and undertaking, and whilst the said plaintiffs were ready and willing to begin and complete the grading of that part of the railroad above specified, in a workmanlike manner and according to the directions of the engi-

neer, to wit, on the first day of December, in the year 1835, at Cecil county aforesaid, wrongfully and unjustly, and without the license or consent of the plaintiffs, and against their will, contracted for the grading of the above stated portion of railroad betwixt Charlestown and the Susquehanna river with other persons than the plaintiffs, and caused the said portion of railroad to be graded by them, whereby the plaintiffs were hindered and prevented from beginning to grade said portion of railroad, and were wrongfully and unjustly, and against their will, discharged by the defendants from beginning and completing the grading of the said railroad betwixt Charlestown and the Susquehanna river, in a workmanlike manner and according to the directions of the engineer; nor did the said defendants pay the plaintiffs 24 cents per cubic yard for the common excavation on said portion of the railroad, nor any part thereof; nor did said defendants pay the plaintiffs for the rock excavated, according to the estimate of the engineer, although often requested so to do, to wit, at the county aforesaid; but to pay the same, or any part thereof, the said defendants have hitherto wholly refused, and still refuse, whereby the said plaintiffs have been deprived of all the profits, benefits, and gains which otherwise might and would have accrued to them from the completion of the grading of the said railroad betwixt Charlestown and the Susquehanna river, to wit, at the county aforesaid.

4th count. And the said plaintiffs further complain, for that, whereas the said plaintiffs, heretofore, to wit, on the 12th day of July, 1836, at Wilmington, that is to say, at the county aforesaid, made another agreement in writing with the said Wilmington and Susquehanna Railroad Company, and amongst other things in said agreement specified, to do all the grading of that part of section No. 9, in the State of Maryland, of the Wilmington and Susquehanna railroad, which extends from station No. 191 to the end of the piers and wharf in the river Susquehanna, opposite Havre de Grace, according to the directions of the engineer and the specifications in said agreement, for the sum of 26 cents per cubic yard for every cubic yard excavated, the said section to be completed in a workmanlike manner, viz., one mile from station No. 191, by the 15th of October, 1836, and the residue by the first day of November ensuing; which said agreement and specification, and all things therein contained, is of the tenor and in the words following, to wit:

Agreement between Sebre Howard and Hiram Howard, of the first part, and the Wilmington and Susquehanna Railroad Company of the second part. The party of the first part, in consideration of the matters hereinafter referred to and set out, covenants and agrees, to and with the party of the second part, to furnish and deliver, at the proper cost of the said party of the first part, the building materials which are described in the annexed schedule to the said party of the second part, together with the necessary workmanship and labor on said railroad, and at such times and in such quantities as the party of the second part shall require and designate; and faithfully, diligently, and in a good and workmanlike

manner to do, execute, and perform the office work and labor in the said schedule mentioned. And the party of the second part, in consideration of the premises, covenants and agrees to pay the party to the first part the sums and prices in the said schedule mentioned, on or before the first day of November next, or at such other times and in such manner as therein described. Provided, however, that in case the party of the second part shall at any time be of opinion that the contract is not duly complied with by the said party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular or negligent, then and in such case he shall be authorized to declare this contract forfeited, and thereupon the same shall become null; and the party of the first part shall have no appeal from the opinion and decision aforesaid, and he hereby releases all right to except to or question the same in any place, or under any circumstances whatever. But the party of the first part shall still remain liable to the party of the second part for the damages occasioned to him by the said non compliance, irregularity, or negligence; and provided, also, that in order to secure the faithful and punctual performance of the covenant above made by the party of the first part, and to indemnify and protect the party of the second part from loss in case of default and forfeiture of this contract, the said party of the second part shall, notwithstanding the provision in the annexed schedule, be authorized to retain in their hands, until the completion of the contract, fifteen per cent. of the moneys at any time due to the said party of the first part. Thus covenanted and agreed by the said parties, this twelfth day of July, 1836, as witness their seals.

SEBRE HOWARD, [SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]
JAMES CANBY, *Prest.* [SEAL.]

Signed, sealed, and delivered in the presence of—the date above changed to 1st of November; and in the schedule the price changed to 26 cents, and an extra price for extra haul inserted, and the work fixed to be done by Nov. 1, 1836, before signing.

WM. P. BROBSON.

Schedule referred to above.

The above named Sebre Howard and Hiram Howard contract to do all the grading of that part of section No. 9, in the State of Maryland, of the Wilmington and Susquehanna Railroad, which extends from station No. 191 to the end of the piers and wharf in the river Susquehanna, opposite Havre de Grace, according to the directions of the engineer, and according to the specification hereto annexed, for the sum of 26 cents per cubic yard, for every cubic yard excavated; the said section to be completed in a workmanlike manner, viz., one mile from station No. 191, by October 15, 1836, and the residue by November 1, com-

neer, to wit, on the first day of December, in the year 1835, at Cecil county aforesaid, wrongfully and unjustly, and without the license or consent of the plaintiffs, and against their will, contracted for the grading of the above stated portion of railroad betwixt Charlestown and the Susquehanna river with other persons than the plaintiffs, and caused the said portion of railroad to be graded by them, whereby the plaintiffs were hindered and prevented from beginning to grade said portion of railroad, and were wrongfully and unjustly, and against their will, discharged by the defendants from beginning and completing the grading of the said railroad betwixt Charlestown and the Susquehanna river, in a workmanlike manner and according to the directions of the engineer; nor did the said defendants pay the plaintiffs 24 cents per cubic yard for the common excavation on said portion of the railroad, nor any part thereof; nor did said defendants pay the plaintiffs for the rock excavated, according to the estimate of the engineer, although often requested so to do, to wit, at the county aforesaid; but to pay the same, or any part thereof, the said defendants have hitherto wholly refused, and still refuse, whereby the said plaintiffs have been deprived of all the profits, benefits, and gains which otherwise might and would have accrued to them from the completion of the grading of the said railroad betwixt Charlestown and the Susquehanna river, to wit, at the county aforesaid.

4th count. And the said plaintiffs further complain, for that, whereas the said plaintiffs, heretofore, to wit, on the 12th day of July, 1836, at Wilmington, that is to say, at the county aforesaid, made another agreement in writing with the said Wilmington and Susquehanna Railroad Company, and amongst other things in said agreement specified, to do all the grading of that part of section No. 9, in the State of Maryland, of the Wilmington and Susquehanna railroad, which extends from station No. 191 to the end of the piers and wharf in the river Susquehanna, opposite Havre de Grace, according to the directions of the engineer and the specifications in said agreement, for the sum of 26 cents per cubic yard for every cubic yard excavated, the said section to be completed in a workmanlike manner, viz., one mile from station No. 191, by the 15th of October, 1836, and the residue by the first day of November ensuing; which said agreement and specification, and all things therein contained, is of the tenor and in the words following, to wit:

Agreement between Sebre Howard and Hiram Howard, of the first part, and the Wilmington and Susquehanna Railroad Company of the second part. The party of the first part, in consideration of the matters hereinafter referred to and set out, covenants and agrees, to and with the party of the second part, to furnish and deliver, at the proper cost of the said party of the first part, the building materials which are described in the annexed schedule to the said party of the second part, together with the necessary workmanship and labor on said railroad, and at such times and in such quantities as the party of the second part shall require and designate; and faithfully, diligently, and in a good and workmanlike

manner to do, execute, and perform the office work and labor in the said schedule mentioned. And the party of the second part, in consideration of the premises, covenants and agrees to pay the party to the first part the sums and prices in the said schedule mentioned, on or before the first day of November next, or at such other times and in such manner as therein described. Provided, however, that in case the party of the second part shall at any time be of opinion that the contract is not duly complied with by the said party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular or negligent, then and in such case he shall be authorized to declare this contract forfeited, and thereupon the same shall become null; and the party of the first part shall have no appeal from the opinion and decision aforesaid, and he hereby releases all right to except to or question the same in any place, or under any circumstances whatever. But the party of the first part shall still remain liable to the party of the second part for the damages occasioned to him by the said non compliance, irregularity, or negligence; and provided, also, that in order to secure the faithful and punctual performance of the covenant above made by the party of the first part, and to indemnify and protect the party of the second part from loss in case of default and forfeiture of this contract, the said party of the second part shall, notwithstanding the provision in the annexed schedule, be authorized to retain in their hands, until the completion of the contract, fifteen per cent. of the moneys at any time due to the said party of the first part. Thus covenanted and agreed by the said parties, this twelfth day of July, 1836, as witness their seals.

SEBRE HOWARD, [SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]
JAMES CANBY, *Prest.* [SEAL.]

Signed, sealed, and delivered in the presence of—the date above changed to 1st of November; and in the schedule the price changed to 26 cents, and an extra price for extra haul inserted, and the work fixed to be done by Nov. 1, 1836, before signing.

Wm. P. Brobson.

Schedule referred to above.

The above named Sebre Howard and Hiram Howard contract to do all the grading of that part of section No. 9, in the State of Maryland, of the Wilmington and Susquehanna Railroad, which extends from station No. 191 to the end of the piers and wharf in the river Susquehanna, opposite Havre de Grace, according to the directions of the engineer, and according to the specification hereto annexed, for the sum of 26 cents per cubic yard, for every cubic yard excavated; the said section to be completed in a workmanlike manner, viz., one mile from station No. 191, by October 15, 1836, and the residue by November 1, eigh-

ing. They also contract to make the embankment at the river from the excavation of the road, provided the haul shall not exceed a distance of eight hundred feet from the eastern termination of the said embankment; all other portions of the hauling together not to exceed an average of eight hundred feet; and for any distance exceeding the said average, the price shall be one and a-half cents per cubic yard for each hundred feet haul. The party of the second part contracts to pay to the said Sebre Howard and Hiram Howard the said sum of twenty-six cents per cubic yard in monthly payments, according to the measurement and valuation of the engineer, retaining from each payment fifteen per cent. until the final completion of the work. If any additional work, in consequence of water, grubbing, or hard material, is required on the side ditch, or ditches, through Cowden's woods, the same is to be decided by the engineer, as in case of rock, &c. &c.

Specification of the manner of grading the Wilmington and Susquehanna Railroad.

Before commencing any excavation or embankment, the natural sod must be removed to a depth of three inches from the whole surface occupied by the same, for the purpose of afterwards sodding the slopes thereof; and all stumps, trees, bushes, &c., entirely removed from the line of the road as directed by the engineer.

In cases of embankment, a grip must be cut about one foot deep for footing the slopes, and preventing them from slipping.

The embankments must be very carefully carried up in layers of about one foot in thickness, laid in a hollow form, and in so doing, all hauling or wheeling, whether loaded or empty, must be done over the same. The slopes of the excavations and embankments will be one and a-half horizontal to one perpendicular, except where otherwise ordered by the engineer, and are to be sodded with the sods removed from the original surface.

Side ditches and back drains must be cut wherever ordered by the engineer, at the same price as the common excavation. The side ditches will, on an average, be about nine feet wide on top, and about two feet deep, and will extend along a great portion of the road.

In most places where embankments are to be made, the cutting of the adjacent parts is about sufficient for their formation, and as the contractor is supposed to have examined the ground and profiles, and to have formed his estimates accordingly, no allowance will be made for extra hauling; where more earth is required than is procured from the excavation, the contractor shall take it from such places as the engineer may direct, the cost per cubic yard being the same as the rest.

Where there is any earth from the excavation more than is required for the embankment, it shall be placed where ordered by the engineer. All the estimates will be made by measuring the excavation only. Loose rock, boulders, iron stone, or other pebbles of a less weight than one-fourth of a ton, are to be removed by the contractor at the same price as the common excavation; but in cases of larger size, or for blast-

4579

ing, the price shall be a matter of special agreement between the contractor and engineer, and if the former should not be willing to execute it for what appears to the engineer a fair price, the latter may put the same into other hands. No extra allowance will be made for cutting down trees, grubbing, bailing, or other accidental expenses. Measurements and estimates will be taken about once a month, and full payments will be made by the directors, after deducting 15 per cent., which deduction on each estimate will be retained until the entire contract is completed, which must be on or before .

It is to be distinctly understood by the contractors, that the use of ardent spirits among the workmen is strictly forbidden.

WILLIAM STRICKLAND,
Chf. eng'r Wil. & S. R. R. Co.

And thereupon, afterwards, to wit, on the said twelfth day of July, in the year 1836, at the county aforesaid, in consideration that the plaintiffs, at the special instance and request of the said defendants, had then and there undertaken, and faithfully promised the said defendants, to perform and fulfil all things in said agreement on said plaintiffs' part and behalf to be performed and fulfilled, they, the said defendants, undertook and faithfully promised the said plaintiffs to perform and fulfil all things in said agreement on the defendants' part to be performed and fulfilled. And said plaintiffs declare, that soon after the making of the said agreement, for the purpose, and with the intent of fulfilling and performing all things in said agreement on their part to be performed and fulfilled, to wit, on the 23d day of July, in the year 1836, at the county aforesaid, they promptly and diligently commenced doing and executing the grading of that part of section No. 9, in said agreement set out and contracted for by them, and were fully prepared with laborers, means, and instruments, to execute the work in the manner and in the time specified in said agreement for the completion of the same; and so continued actively and diligently to prosecute and do the work of grading, and all other work contracted for in said agreement, until the 17th day of September, 1836, when said plaintiffs were served by the sheriff of Cecil county with a writ of injunction, issued from the high court of chancery, sealed with the great seal of the State of Maryland, and signed by the honorable Theodorick Bland, chancellor; which said injunction was of the tenor following, to wit:

MARYLAND, *set.*

The State of Maryland to the Delaware and Maryland Railroad Company, its president and directors, agents and servants, of Cecil county, greeting:

Whereas John Stump hath exhibited to us in our court of [SEAL.] chancery his bill of complaint against you, the said Delaware and Maryland Railroad Company, for relief in equity, and to prohibit and enjoin you, the said Delaware and Maryland Railroad Company, your president and directors, agents and servants, and each

and every of you, to forbear, desist, surcease, and refrain, absolutely and altogether, from making, constructing, or completing the wharf contemplated and laid out by you, the said Delaware and Maryland Railroad Company, from the lot leased by the father of the said complainant to Martha Coffield, on the Susquehanna river, and from all and every act whatsoever towards the making, completing, or using, in any manner, the said wharf, or any part thereof; and from placing any stone, gravel, earth, logs, timber, board, or any other substance or material on said wharf, or any part thereof, or in the said river, and from driving down piles or timbers in said river; and from every other and further act touching or affecting the said wharf, commenced by you from the Cecil shore of the Susquehanna river, until the matter shall be heard in equity: we, therefore, do hereby command and strictly enjoin you, the said Delaware and Maryland Railroad Company, your president and directors, and agents and servants, that from henceforth you, and each and every of you, do absolutely forbear, desist, surcease, and refrain altogether from making, constructing, or completing the said wharf contemplated and laid out by you, the said Delaware and Maryland Railroad Company, from the lot leased by the father of the said complainant to the said Martha Coffield on the Susquehanna river, and from all and every act whatsoever towards the making, completing, or using, in any manner, the said wharf, or any part thereof; and from placing any stone, gravel, earth, logs, timber, boards, or any other substance or material on said wharf, or any part thereof, or in the said river, and from driving down piles or timber in said river; and from any other and further act touching or affecting the said wharf commenced by you from the Cecil shore of the Susquehanna river, until the further order of the court of chancery.

Witness the honorable Theodorick Bland, esquire, chancellor, this 13th day of September, 1836.

Test: RAMSEY WATERS,
Reg. Cur. Con.

In chancery, 13th September, 1836.

Ordered, that writs of subpœna and injunction issued as prayed by the foregoing bill of complaint; and it is further ordered, that at any time after the said defendants have filed their answers, the court will hear a motion to dissolve the said injunction, provided the said defendants give to the said plaintiff, or his solicitor, ten days' notice thereof; and the register is directed to endorse a copy of this order on the said writ of injunction, that it may be served therewith on the said defendants.

THEODORICK BLAND, *Chr.*

On which injunction was thus endorsed: "Enjoined."
NOBLE PENNINGTON, *Shff.*

True copy.

Test: RAMSEY WATERS,
Reg. Cur. Con.

By means of which injunction the plaintiffs were prevented and delayed from executing the work in said agreement contracted to be performed and done in the time specified in said agreement, and were enjoined and prohibited from working upon that part of the railroad, in said injunction mentioned, being part of section No. 9 in said agreement mentioned, for a long space of time, to wit, from the said 17th day of September, the day on which said injunction was served, until 30th day of October in the same year, being the day when said injunction was appealed from, and appeal bonds filed; whereby said plaintiffs suffered great delay, inconvenience, and expense in conducting and performing the grading of the said railroad in said agreement mentioned, for and during the whole time the said injunction remained and continued in force; and said plaintiffs declare, that at the time of making of said agreement, the ground upon which the said railroad was to be graded was laid down on the profile prepared by the engineer, and marked out by stakes to show the width of the railroad track at the surface of the earth, and also the width of the embankment, (as referred to in the specification in said agreement,) all of which were examined by the said plaintiffs at the request of the defendants before they made and entered into said agreement.

And said plaintiffs aver, that although a great part of the embankment to be made was staked out and laid down on the profile to be only 15 feet wide at the top, the engineer ordered and directed the plaintiffs to make the embankment 30 feet wide at the top along a great part of the railroad in said agreement mentioned. And said plaintiffs further aver, that whilst they were executing the work according to the profile as aforesaid, the engineer of the defendants ordered and directed the plaintiffs to grade the railroad feet deeper than it was laid down on said profile, whereby said plaintiffs were greatly delayed, and were prevented from completing the 1st mile of the road before the 20th of October, 1836, which was then completed and finished according to, and under the directions of, the engineer aforesaid.

And said plaintiffs further aver, that notwithstanding the said injunction, and all the other actings and doings of the said defendants, in the premises as aforesaid, they did, with great diligence and care, and with all proper and necessary means, and without any unnecessary or unavoidable delay, proceed with, and continue to execute the work in said agreement specified, according to the terms and conditions thereof, in a faithful and workmanlike manner; and did observe, fulfil, and keep all the terms and conditions of said agreement on their part to be observed and kept, or except so far only as they were prevented from finishing the work in the time specified in said agreement by the injunction aforesaid, and the orders, interference, and hindrance of the said defendants; and that after the said 15th day of October, 1836, and the said first day of November ensuing, the times fixed for the completion of said work, in said agreement specified, they proceeded under the orders of the engineer aforesaid, and at the request, and by the permission of the said defendants, and by the authority and virtue of the

and every of you, to forbear, desist, surcease, and refrain, absolutely and altogether, from making, constructing, or completing the wharf contemplated and laid out by you, the said Delaware and Maryland Railroad Company, from the lot leased by the father of the said complainant to Martha Coffield, on the Susquehanna river, and from all and every act whatsoever towards the making, completing, or using, in any manner, the said wharf, or any part thereof; and from placing any stone, gravel, earth, logs, timber, board, or any other substance or material on said wharf, or any part thereof, or in the said river, and from driving down piles or timbers in said river; and from every other and further act touching or affecting the said wharf, commenced by you from the Cecil shore of the Susquehanna river, until the matter shall be heard in equity: we, therefore, do hereby command and strictly enjoin you, the said Delaware and Maryland Railroad Company, your president and directors, and agents and servants, that from henceforth you, and each and every of you, do absolutely forbear, desist, surcease, and refrain altogether from making, constructing, or completing the said wharf contemplated and laid out by you, the said Delaware and Maryland Railroad Company, from the lot leased by the father of the said complainant to the said Martha Coffield on the Susquehanna river, and from all and every act whatsoever towards the making, completing, or using, in any manner, the said wharf, or any part thereof; and from placing any stone, gravel, earth, logs, timber, boards, or any other substance or material on said wharf, or any part thereof, or in the said river, and from driving down piles or timber in said river; and from any other and further act touching or affecting the said wharf commenced by you from the Cecil shore of the Susquehanna river, until the further order of the court of chancery.

Witness the honorable Theodorick Bland, esquire, chancellor, this 13th day of September, 1836.

Test: RAMSEY WATERS,
Reg. Cur. Con.

In chancery, 13th September, 1836.

Ordered, that writs of subpœna and injunction issued as prayed by the foregoing bill of complaint; and it is further ordered, that at any time after the said defendants have filed their answers, the court will hear a motion to dissolve the said injunction, provided the said defendants give to the said plaintiff, or his solicitor, ten days' notice thereof; and the register is directed to endorse a copy of this order on the said writ of injunction, that it may be served therewith on the said defendants.

THEODORICK BLAND, *Chr.*

On which injunction was thus endorsed: "Enjoined."
NOBLE PENNINGTON, *Shff.*

True copy.
Test: RAMSEY WATERS,
Reg. Cur. Con.

By means of which injunction the plaintiffs were prevented and delayed from executing the work in said agreement contracted to be performed and done in the time specified in said agreement, and were enjoined and prohibited from working upon that part of the railroad, in said injunction mentioned, being part of section No. 9 in said agreement mentioned, for a long space of time, to wit, from the said 17th day of September, the day on which said injunction was served, until 30th day of October in the same year, being the day when said injunction was appealed from, and appeal bonds filed; whereby said plaintiffs suffered great delay, inconvenience, and expense in conducting and performing the grading of the said railroad in said agreement mentioned, for and during the whole time the said injunction remained and continued in force; and said plaintiffs declare, that at the time of making of said agreement, the ground upon which the said railroad was to be graded was laid down on the profile prepared by the engineer, and marked out by stakes to show the width of the railroad track at the surface of the earth, and also the width of the embankment, (as referred to in the specification in said agreement,) all of which were examined by the said plaintiffs at the request of the defendants before they made and entered into said agreement.

And said plaintiffs aver, that although a great part of the embankment to be made was staked out and laid down on the profile to be only 15 feet wide at the top, the engineer ordered and directed the plaintiffs to make the embankment 30 feet wide at the top along a great part of the railroad in said agreement mentioned. And said plaintiffs further aver, that whilst they were executing the work according to the profile as aforesaid, the engineer of the defendants ordered and directed the plaintiffs to grade the railroad feet deeper than it was laid down on said profile, whereby said plaintiffs were greatly delayed, and were prevented from completing the 1st mile of the road before the 20th of October, 1836, which was then completed and finished according to, and under the directions of, the engineer aforesaid.

And said plaintiffs further aver, that notwithstanding the said injunction, and all the other actings and doings of the said defendants, in the premises as aforesaid, they did, with great diligence and care, and with all proper and necessary means, and without any unnecessary or unavoidable delay, proceed with, and continue to execute the work in said agreement specified, according to the terms and conditions thereof, in a faithful and workmanlike manner; and did observe, fulfil, and keep all the terms and conditions of said agreement on their part to be observed and kept, or except so far only as they were prevented from finishing the work in the time specified in said agreement by the injunction aforesaid, and the orders, interference, and hindrance of the said defendants; and that after the said 15th day of October, 1836, and the said first day of November ensuing, the times fixed for the completion of said work, in said agreement specified, they proceeded under the orders of the engineer aforesaid, and at the request, and by the permission of the said defendants, and by the authority and virtue of the

agreement aforesaid, to execute the work in said agreement mentioned, according to the terms and conditions thereof, and performed and fulfilled every thing on their part by said agreement to be done and performed, from the time of making said agreement until the 19th day of January in the year 1837. And said plaintiffs declare, that the engineer of said company estimated the work of said plaintiffs, done under said agreement, in the month of December, 1836, according to measurement and valuation, at the sum of three thousand six hundred and some dollars, before deducting the 15 per cent. specified in said agreement to be retained by said company until the final completion of said work; yet the said defendants, disregarding the terms of said agreement, although often requested so to do, at the county aforesaid, have not yet paid the said sum of $3,600, after deducting the 15 per cent. aforesaid, or any part of the 15 per cent. so retained as aforesaid, but contriving and intending to defraud and injure said plaintiffs, after paying them one thousand dollars, a part of said estimate, refused and still do refuse to pay the balance.

And said plaintiffs further aver, that according to the terms of said agreement, when there was any earth from the excavation, more than was required for the embankment, it was to be placed where ordered by the engineer; yet the defendants, well knowing the premises, on the 19th day of January, in the year 1837, at Wilmington, that is to say, at Cecil county aforesaid, notwithstanding the request and demand of the plaintiffs in this behalf, but intending and contriving, artfully and deceitfully, to defraud and injure the said plaintiffs, refused to permit the engineer to point out or order any place where to deposit the earth from the excavation, although there was a large quantity of earth to be removed from the excavations more than was required for the embankments; and also refused to pay said plaintiffs one and a half cents per cubic yard for each hundred feet hauled over eight hundred feet in distance, as by the terms of said agreement they were bound and required to do; but said defendants, artfully and fraudulently contriving to impose upon said plaintiffs by forcing them to submit to an alteration of the terms of said agreement, or to be deprived of all the benefits and advantages to which they were entitled to under the same, declared the said agreement to be forfeited, and refused to comply with the terms and conditions thereof on their part to be observed and fulfilled and kept, whereby said plaintiffs were suddenly thrown out of employment, and unjustly and fraudulently prevented from completing the work contracted to be done by them as aforesaid, and have lost all gains and profits which they might and would otherwise have made and acquired from finishing the work according to said agreement.

5th count. And the said plaintiffs further complain, for that whereas, after the said 15th October and the said 1st November, the times fixed for the completion of the said work and labor, described in the said agreement on the 12th July, 1836, stated in the fourth count of this mar., the said plaintiffs, at the special instance and request of the said defendants, to wit, on the 2d day of November, 1836, at Wilmington, to wit, at Cecil county aforesaid, undertook and agreed with the said

defendants to finish and complete all and singular the work and labor in the agreement aforesaid, which then remained unfinished and incomplete, at the prices and in the manner stipulated in the said agreement, and to do and perform the same within a reasonable time; and that the said defendants, in consideration thereof, promised and agreed to pay the said plaintiffs all that was then due them, and also for the said work and labor, the prices stipulated in the said agreement, and to do and perform all and singular the covenants and agreements on the part of the said defendants to be done, as mentioned in the said agreement.

And the plaintiffs further aver, that in consideration thereof they, the said plaintiffs, did proceed diligently and faithfully with the said work and labor at the said instance and request of said defendants, and that while they were so employed, faithfully and diligently executing the said work and labor, and after the same had progressed considerably, the said defendants refused to do and perform the covenants and agreements on their part to be done and performed; and that the said defendants, and their agents and engineers, refused to suffer and permit the said plaintiffs to proceed with the said work and labor, and to finish and complete the same, according to the terms of the said agreement; and the plaintiffs in fact say, that they were prevented from finishing and completing all the said work and labor, in the manner stipulated in the agreement aforesaid, by the orders, directions, hindrances, and interference of the said defendants, their agents and engineers, and that they, the said plaintiffs, were ready and willing to have done and performed, and offered to do and perform, all and singular the said work and labor within a reasonable time, and in the manner stipulated in the agreement aforesaid, of which said defendants then and there had notice, to wit, at the county aforesaid; but the plaintiffs were prohibited and prevented from doing the said work and labor, at the times and in the manner aforesaid, by the refusal of the said defendants to observe and perform the covenants and agreements, on their part to be done and performed, as set forth in the written agreement aforesaid, and by the interference and hindrance of said defendants, and their agents and engineers, to wit, at the county aforesaid; by reason of which said injuries and fraudulent conduct on the part of the said defendants, the said plaintiffs were prevented from realizing the benefits, profits, and advantages which they would have derived from the completion of the said work and labor, and the observance of the said last mentioned agreement on the part of the said defendants; wherefore the said plaintiffs say they are injured and have suffered damages fifty thousand dollars.

6th count. And the said plaintiffs further complain, for that; whereas, on the 2d day of November, 1836, at the special instance and request of the defendants, they undertook and agreed with the defendants to finish and complete the work and labor upon section No. 9 on the said road of the defendants, which runs from Wilmington to the Susquehanna river, upon the following terms and conditions, that is to say, (here insert the agreement of the 12th day of July, 1836, leaving out the words, namely, one mile from the station number one and the

residue by November the first ensuing, and inserting in place thereof, and within a reasonable time;) and that the said defendants, in consideration thereof, promised to pay for such work and labor the prices stipulated as aforesaid, and that, in pursuance of said agreement, did forthwith proceed with the said work and labor up to the ninth of January, 1837, when they were prevented by the said defendants from further progressing in said work, and from finishing and completing the same, according to the terms of said agreement; in the first instance, because the said defendants refused to suffer their engineer to order or direct where the surplus earth, from the excavation on said section, over and above the amount of earth required for the embankment in the same section, should be placed, as they were bound to do by the said agreement; and afterwards, in the same month, fraudulently and illegally, entirely stopped the said plaintiffs, and prevented them from going on with and completing the same, and afterwards gave the work to somebody else, by which the said plaintiffs were prevented from finishing and completing their said agreement. And the said plaintiffs further aver, that if they had been permitted to go on with and finish the said work, under said contract, as they offered to said defendants, and intended to do, they would have made large profits, to wit, fifty thousand dollars; whereas, by the said conduct of the said defendants, they not only lost the said profits, but were put to other losses and expenses by being left in the possession of a large force of men and materials, horses and carts, which they had got together for the purpose of completing said work.

7th count. And whereas, also, the said defendants, afterwards, to wit, on the first day of August, 1837, at the county aforesaid, were indebted to the said plaintiffs in the further sum of fifty thousand dollars for the work, labor, and diligence by the said plaintiffs before that time done and performed in and about the business of the said defendants, and for them, and at their special instance and request; and also for divers materials and other necessary things by the said plaintiffs before that time found and provided, and applied in and about that work and labor for the said defendants, and at their like special instance and request; and being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, undertook, and promised the said plaintiffs, to pay them the last mentioned sum of money; nevertheless, the said defendants, not regarding their said promises and undertakings, but although often requested so to do by the said plaintiffs, have not yet paid the said sum of money, or any part thereof, but refuse so to do, to the damage of the said plaintiffs in the sum of fifty thousand dollars.

8th count. And whereas, also, heretofore, to wit, on the day year, at the county aforesaid, in consideration that the said plaintiffs, at the like special instance and request of the said defendants, had before that time undertaken to perform certain work, labor, and service, in and upon the property of the said defendants, to wit, on the railroad between at the county aforesaid; and said plaintiffs aver

that they did perform the said work and labor upon the property aforesaid; and the said defendants undertook, and then and there faithfully promised the said plaintiffs, to pay them so much money as they therefor reasonably deserve to have of the said defendants when they, the said defendants, should be thereunto afterwards requested; and the said plaintiffs aver, that they reasonably deserved to have of the said defendants the further sum of of like lawful money, to wit, at the county aforesaid, whereof the said defendants afterwards, to wit, on the day and year last aforesaid, then and there had notice. Nevertheless the said defendants, not regarding their said promises and undertakings, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiffs in this behalf, have not, as yet, paid the said sums of money, or any part thereof, to the said plaintiffs, although often requested so to do, although they, the said defendants, afterwards, to wit, on the day of the year last aforesaid, at the county aforesaid, were requested by the said plaintiffs so to do; but the said defendants to pay the same have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of the said plaintiffs in the full sum of .

8th count. And the said S. & H. Howard, by their attorney aforesaid, further complain, for that, whereas the Wilmington and Susquehanna Railroad Company heretofore, to wit, on the 12th day of July, in the year 1836, at Wilmington, that is to say, at Cecil county aforesaid, made another agreement in writing with said plaintiffs, by which said agreement, amongst other things therein set out, the plaintiffs agreed to do all the grading of that part of section No. 9 of the Wilmington and Susquehanna railroad, in the State of Maryland, which extends from station No. 191 to the end of the piers and wharf in the river Susquehanna, opposite Havre de Grace, according to the directions of the engineer and the specification in said agreement, for the sum of 26 cents per cubic yard for each cubic yard excavated, the said section to be completed in a workmanlike manner, viz., one mile from station No. 191, by the 15th of October, 1836, and the residue by the first day of November ensuing; which said agreement and specification, and all things therein contained, is set out in totidem verbis in the 4th count of this declaration, as by reference thereto will fully appear. And thereupon, afterwards, to wit, on the 12th day of July, in the year 1836, at the county aforesaid, in consideration that the plaintiffs, at the instance and request of the defendants, then and there undertook, and faithfully promised the said defendants, to perform, fulfil and keep all things in the said agreement on plaintiffs' part to be performed, fulfilled, and kept; they, the said defendants, at the same time and place undertook, and faithfully promised the said plaintiffs, to perform, fulfil, and keep all things in the said agreement on the defendants' part to be performed, fulfilled and kept; and said plaintiffs declare, that soon after the making of said written agreement, for the purpose and with the intent of fulfilling and performing all things in said agreement on their part to be performed and fulfilled, to wit, on the 23d day of July, in

the year 1836, at the county aforesaid, they did promptly and diligently commence grading that part of section No. 9, in said agreement mentioned; and were fully prepared with laborers, means, and utensils to execute the work in the manner and within the time specified in said agreement for the completion of the same, and so continued actively and diligently to prosecute and do the work of grading said railroad, and all other things according to the said agreement, until the 17th day of September, in the year 1836, when said plaintiffs were served by the sheriff of Cecil county with a writ of injunction prohibiting said plaintiffs from working any longer upon a certain portion of said railroad in said agreement specified; which injunction issued from the high court of chancery of the State of Maryland in due form of law, and is set out in totidem verbis in the fourth count of this declaration, together with the sheriff's return and the chancellor's order on the said injunction, as by reference to said 4th count will more fully appear. By force of which injunction the plaintiffs were prevented and delayed from executing the work in said agreement contained in the time specified therein for its completion, and were enjoined from working upon part of the road mentioned in the said agreement for a long space of time, to wit, from the 17th day of September, in the year 1836, being the day on which said injunction was served on said plaintiffs, until the 30th day of October, in the same year, which was the day when said injunction was appealed from and the appeal bond filed. And the said plaintiffs aver that the engineer of the company directed the plaintiffs to make the embankment on the railroad in the agreement mentioned many feet wider than it was marked out on the plat of the road that was made by the engineer, and examined by the plaintiffs at the request of the defendants before entering into the agreement aforesaid; and said engineer also directed the plaintiffs to make the grade of the said road many feet deeper than it was laid down on said plat, whereby the said plaintiffs were prevented from completing the said first mile of said road before the 20th of October, 1836, which was then completed according to the directions of the engineer, of which the defendants had notice then and there, at the county aforesaid. And the plaintiffs say, that notwithstanding the said injunction, and the directions of the engineer aforesaid, they, the said plaintiffs, did afterwards proceed and continue, from the time of making said agreement until the time when the defendants declared the said contract forfeited as hereinafter stated, duly to comply with and progress in the execution of said agreement without being guilty of any irregularity or negligence, and did perform, fulfil, and keep all things on their part in said agreement to be performed, fulfilled, and kept; and did, after the said 15th day of October, and the said 1st day of November, in the year 1836, proceed, under the orders of the engineer aforesaid, and at the request of the said defendants, and by the authority of said agreement, and under the same, to execute the work in said agreement mentioned according to the tenor thereof. And the said plaintiffs declare that after the said 15th day of October and the first day of November, to

wit, on the 2d day of November, in the year 1836, in consideration of the premises, and that the plaintiffs then and there, at the request of the defendants, undertook, and faithfully promised the said defendants, to perform, fulfil, and keep all things in the said agreement on the part of the said plaintiffs to be performed and fulfilled in a reasonable time, they, the said defendants, undertook, and faithfully promised the plaintiffs to perform and fulfil all things in said agreement on the part of the said defendants to be performed, fulfilled, and kept, according to the true intent and meaning of the said agreement, to wit, on the day and year last aforesaid, at the county aforesaid. And the plaintiffs aver that they, confiding in the promise and undertaking of the said defendants, secondly and lastly above made, from and after the 2d day of November, in the year 1836, did proceed and continue to execute the work and labor in the said agreement mentioned, according to said agreement, and to perform, fulfil, and keep all things in said agreement on their part to be performed, fulfilled, and kept, until the 17th day of January, in the year 1837. Yet the said plaintiffs in fact say, that the defendants, before the 18th day of January, 1837, contriving wrongfully and unjustly to injure the plaintiffs, did not nor would perform, fulfil, and keep the matters and things on their part in said agreement to be performed, fulfilled, and kept, according to their undertakings and promises firstly nor secondly above made, but thereby craftily and subtly deceived the said plaintiffs, in this, to wit, that the said defendants refused to permit the engineer to order or point out any place where the plaintiffs might place the earth from the excavations, when there was a large quantity of earth from the excavations more than was required for the embankments; and also refused to pay said plaintiffs one and a half cents per cubic yard for each hundred feet haul of the earth from the excavation of the road to make the embankment at the river, although the haul from the excavations to the eastern termination of the embankment at the river exceeded an average distance of eight hundred feet; and also refused to pay plaintiffs one and a half cents per cubic yard for each hundred feet haul of the earth from the excavation of the road, when all the other portions of the haul exceeded an average distance of eight hundred feet, as by the said agreement they were required to do. But the said defendants, after they had, as above stated, broken said contract, and disregarded their promises and undertakings, by refusing to comply with the terms of the said contract, in the manner hereinbefore stated, and when the said plaintiffs had duly complied with the said contract, and whilst the same was in due progress of execution, and the said plaintiffs were not irregular or negligent, and before a reasonable time had been allowed for said plaintiffs to complete the said contract, the said defendants attempted to declare the said contract forfeited and null, without the consent and against the will of said plaintiffs, to wit, on the 19th day of January, in the year 1837, at the county aforesaid, whereby the said defendants did not nor would suffer or permit the said plaintiffs to proceed any further to execute the said contract, but then and there

wrongfully discharged the said plaintiffs from any further completion of their said agreement, and hindered and prevented them from finishing the work in said contract specified; nor did the said defendants pay the said plaintiffs 26 cents per cubic yard of earth excavated on said road, according to the measurement and valuation of the engineer, but to pay the same, or any part thereof, the said defendants, although often requested so to do, to wit, at the county aforesaid, have hitherto wholly refused, and still refuse, whereby the said plaintiffs say that they have not only been refused payment of the money due them for work done on said railroad before the said 19th day of January, 1837, but have also been deprived unjustly of all the profits, benefits, and gains which otherwise might and would have accrued to them if they had been permitted by said defendants to complete the work in said contract mentioned; whereupon the said plaintiffs say they are injured and defrauded, and have sustained damages, to the amount of fifty thousand dollars, to wit, at the county aforesaid; and thereupon they bring their suit, &c.

HY. STUMP,
Attorney for plaintiffs.

Rule plea.

And thereupon, on motion of *the* Sebre Howard and Hiram Howard, by their said attorneys, it is ruled by the court here that the said Wilmington and Susquehanna Railroad Company answer to the declaration aforesaid of the said Sebre Howard and Hiram Howard in the plea aforesaid, or judgment by the court here will be rendered against them in default thereof.

Whereupon the said Wilmington and Susquehanna Railroad Company, by their attorneys aforesaid, file in court here the following pleas, to wit:

Pleas.

Action of assumpsit in Cecil county court, April term, 1841.

The Wilmington and Susquehanna Railroad Company
ats.
Sebre Howard and Hiram Howard.

1. And the said defendant, by John C. Groome, its attorney, comes and defends the wrong and injury, when, &c., and says, that the said defendant did not undertake and promise in manner and form as the said plaintiffs have above complained against it; and of this the defendant puts itself upon the country, &c.

2. And for further plea in this behalf the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that after the making of the supposed promises in the said declaration mentioned, and before the commencement of this suit, to wit, on the first day of

March, in the year of our Lord eighteen hundred and thirty-seven, at the county aforesaid, the said defendant paid to the plaintiffs divers sums of money, amounting, to wit, all the money in said declaration mentioned, in full satisfaction and discharge of all the causes and rights of action in the said declaration mentioned, which payment the said plaintiffs did then and there accept of and from the said defendant in such full satisfaction and discharge as aforesaid, and this the said defendant is ready to verify, &c.; wherefore the said defendant prays judgment if the said plaintiffs their aforesaid action against this defendant to have or maintain, ought, &c.

3. And for a further plea in this behalf, as to the said fourth count of the said declaration, the said defendant, by leave of the court here for the purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiffs their aforesaid action thereof against this defendant to have or maintain ought not, because this defendant says, that after the making of the said supposed agreement in the said fourth count mentioned, to wit, on the eighteenth day of January, in the year of our Lord eighteen hundred and thirty-seven, the said plaintiffs had become and were, and for a long space of time then next before had been, irregular and negligent in the prosecution of the work in said agreement mentioned, and had not duly complied with the terms of said agreement, to wit, at Cecil county aforesaid; and the said defendant in fact further saith, that after the making of the said agreement, and before and on the said eighteenth day of January, in the year of our Lord eighteen hundred and thirty-seven, to wit, on the day and year last aforesaid, at the county aforesaid, the said work and labor in the said agreement mentioned was not in due progress of execution, to wit, at Cecil county aforesaid; of all which said premises the said plaintiffs and this defendant then and there, to wit, on the day and year aforesaid, at the county aforesaid, had notice; and the said defendant in fact further saith, that afterwards, and whilst the said plaintiffs so were, and continued to be, irregular and negligent in the execution of the said agreement, and without having duly complied with the terms of said agreement, and whilst the said work was not in due progress of execution, this defendant being of opinion that the said agreement had not been duly complied with by the said plaintiffs, and that the work in said agreement mentioned was not in due progress of execution, to wit, on the day and year last aforesaid, at the county aforesaid, in virtue of the provisions of said agreement, and in exercise of the authority thereby given and reserved, did declare the said agreement to be forfeited as for the cause aforesaid this defendant might lawfully do; of all which premises the said plaintiffs afterwards, to wit, on the day and year aforesaid, at the county aforesaid, had notice. By reason whereof, and by force and effect of the said agreement, the same agreement thereby became and was null, and the said defendant is ready to verify; wherefore the said defendant prays judgment, &c.

4th. And for further plea in this behalf, as to the said fifth count in the said declaration, the said defendant, by leave of the court here for

this purpose first had and obtained, according to the form of the statute in such cases made and provided, says that the said plaintiffs their aforesaid action thereof against this defendant to have or maintain ought not, because this defendant says, that after the making of the said supposed agreement in the said fifth count mentioned, to wit, on the eighteenth day of January, in the year of our Lord eighteen hundred and thirty-seven, the said plaintiffs had become and were, and for a long space of time then next before had been, irregular and negligent in the prosecution of the work in said agreement mentioned, and had not duly complied with the terms of the said agreement, to wit, at Cecil county aforesaid; and the said defendant, in fact, further saith, that after the making of the said agreement, and before and on the said eighteenth day of January, in the year of our Lord eighteen hundred and thirty-seven, to wit, on the day and year last aforesaid, at the county aforesaid, the said work and labor in the said agreement mentioned was not in due progress of execution, to wit, at Cecil county aforesaid; of all which said premises the said plaintiffs and this defendant then and there, to wit, on the day and year last aforesaid, at the county aforesaid, had notice. And the said defendant in fact further saith, that afterwards, and whilst the said plaintiffs so were, and continued to be, irregular and negligent in the execution of the said agreement, and without having duly complied with the terms of said agreement, and whilst the said work was not in due progress of execution, this defendant being of opinion that said agreement had not been duly complied with by the said plaintiffs, and that the work in said agreement mentioned was not in due progress of execution, to wit, on the day and year last aforesaid, at the county aforesaid, in virtue of the provisions of said agreement, and in exercise of the authority thereby given and reserved, did declare the said agreement to be forfeited, as for the cause aforesaid this defendant might lawfully do; of all which premises the said plaintiffs afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice; by reason whereof, and by force and effect of the said agreement, the same agreement thereby became and was null; and this the said defendant is ready to verify. Wherefore the said defendant prays judgment, &c.

5th. And for a further plea in this behalf, as to the said sixth count of the said declaration, the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiffs their aforesaid action thereof against this defendant to have or maintain ought not, because this defendant says, after the making the said supposed agreement in the said sixth count mentioned, to wit, on the eighteenth day of January, in the year of our Lord eighteen hundred and thirty-seven, the said plaintiffs had become, and were, and for a long space of time then next before had been, irregular and negligent in the prosecution of the work in said agreement mentioned, and had not complied with the terms of the said agreement, to wit, at Cecil county aforesaid; and the said defendant in fact further saith, that af-

ter the making of the said agreement, and before and on the said eighteenth day of January, in the year of our Lord eighteen hundred and thirty-seven, to wit, on the day and year last aforesaid, at the county aforesaid, the said work and labor in the said agreement mentioned was not in due progress of execution, to wit, at Cecil county aforesaid; of all which said premises the said plaintiffs and this defendant then and there, to wit, on the day and year last aforesaid, at the county aforesaid, had notice. And the said defendant in fact further saith, that afterwards, and whilst the said plaintiffs so were, and continued to be, irregular and negligent in the execution of the said agreement, and without having duly complied with the terms of said agreement, and whilst the said work was not in due progress of execution, this defendant being of opinion that said agreement had not been duly complied with by the said plaintiffs, and that the work in said agreement mentioned was not in due progress of execution, to wit, on the day and year last aforesaid, at the county aforesaid, in virtue of the provision of said agreement, and in exercise of the authority thereby given and reserved, did declare the said agreement to be forfeited, as for the cause aforesaid this deponent might lawfully do; of all which premises the said plaintiffs afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice. By reason whereof, and by force and effect of the said agreement, the same agreement thereby became and was null; and this the said defendant is ready to verify. Wherefore the said defendant prays judgment, &c.

6th. And for a further plea in this behalf, as to the said eighth count of the said declaration, the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiffs their aforesaid action thereof against this defendant to have or maintain ought not, because this defendant says, that after making of the said supposed agreement in the said eighth count mentioned, to wit, on the eighteenth day of January, in the year of our Lord eighteen hundred and thirty-seven, the said plaintiffs had become, and were, and for a long space of time then next before had been, irregular and negligent in the prosecution of the work in said agreement mentioned, and had not duly complied with the terms of the said agreement, to wit, at Cecil county aforesaid; and the said defendant in fact further saith, that after the making of the said agreement, and before and on the said eighteenth day of January, in the year of our Lord eighteen hundred and thirty-seven, to wit, on the day and year last aforesaid, at the county aforesaid, the said work and labor in the said agreement mentioned was not in due progress of execution, to wit, at Cecil county aforesaid; of all which said premises the said plaintiffs and this defendant then and there, to wit, on the day and year last aforesaid, at the county aforesaid, had notice; and the said defendant in fact further saith, that afterwards, and whilst the said plaintiffs so were, and continued to be, irregular and negligent in the execution of the said agreement, and

without having duly complied with the terms of the said agreement, and whilst the said work was not in due progress of execution, this defendant being of opinion that the said agreement had not been duly complied with by the said plaintiffs, and that the work in said agreement mentioned was not in due progress of execution, to wit, on the day and year last aforesaid, in virtue of the provisions of the said agreement, and in exercise of the authority thereby given and reserved, did declare the said agreement to be forfeited, as for the cause aforesaid this defendant might lawfully do; of all which premises the said plaintiffs afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice. By reason whereof, and by force and effect of the said agreement, the same agreement thereby became and was null; and this the said defendant is ready to verify. Wherefore the said defendant prays judgment, &c.

7th. And the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, for a further plea in this behalf, as to the said first count of the said declaration says, that the said plaintiffs, their aforesaid action thereof against this defendant, to have or maintain ought not, because this defendant says, that after the making of the said supposed contract in the said first count mentioned, and before the commencement of this suit, to wit, on the twelfth day of July, in the year of our Lord eighteen hundred and thirty-six, a certain agreement, by deed in writing, was then and there made and entered into by and between the said plaintiffs and the said defendant; and which said last mentioned agreement was of the tenor following, to wit. (Here set out at length the agreement of 12th July, 1836.) And said defendant in fact says, that the said part of section No. 9, in the State of Maryland, of the Wilmington and Susquehanna Railroad, which extends from station No. 191 to the end of the piers and wharf in the river Susquehanna, opposite Havre de Grace, as mentioned in said last mentioned agreement, is a part of that part of the said railroad between Charlestown and Havre de Grace in said first count mentioned, and which is thereby alleged to have been included in the said supposed contract in said count mentioned, and not another or different part; of which premises the said plaintiffs and this defendant, before and at the time of the making of the said agreement in this plea recited, had notice, to wit, at the county aforesaid; and the said defendant in fact says, that after the making of the said agreement in this plea above recited, the said plaintiffs, under and in virtue of the said agreement in this plea above recited, commenced and prosecuted the work on that part of section No. 9, in the State of Maryland, of the Wilmington and Susquehanna Railroad, which extends from station No. 191 to the end of the piers and wharf in the river Susquehanna, opposite Havre de Grace, as mentioned in the same agreement; and that all the work which was done by said plaintiffs on that part of said section No. 9 was commenced, prosecuted, and done under and in virtue of said agreement in this plea above recited, and not otherwise, nor under any

other or different agreement. By reason of which said premises the said supposed contract in the said first count mentioned became merged, extinguished, waived, released, and abandoned; and this the said defendant is ready to verify. Wherefore, &c.

8th. And the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, for a further plea in this behalf, as to the said second count of the said declaration, says, that the said plaintiffs their aforesaid action thereof against this defendant to have or maintain ought not, because this defendant says, that after the making of the said supposed contract in the said second count mentioned, and before the commencement of this suit, to wit, on the 12th day of July, in the year of our Lord eighteen hundred and thirty-six, a certain agreement by deed in writing was then and there made and entered into by and between the said plaintiffs and the said defendant; and which said last mentioned agreement was of the tenor following, to wit, (here set out at length the agreement of 12th July, 1836.) And the said defendant in fact says, that the said part of section No. 9, in the State of Maryland, of the Wilmington and Susquehanna railroad, which extends from station No. 191 to the end of the piers and wharf in the river Susquehanna, opposite Havre de Grace, as mentioned in said last mentioned agreement, is a part of that part of the said railroad between Charlestown and Havre de Grace in said second count mentioned, and which is thereby alleged to have been included in the said supposed contract in said count mentioned, and not another or different part; of which premises the said plaintiffs and this defendant, before and at the time of the making of the said agreement in this plea recited, had notice, to wit, at the county aforesaid. And the said defendant in fact says, that after the making of the said agreement in this plea above recited, the said plaintiffs, under and in virtue of the said agreement in this plea above recited, commenced and prosecuted the said work on that part of section No. 9, in the State of Maryland, of the Wilmington and Susquehanna railroad, which extends from station No. 191 to the end of the piers and wharf in the river Susquehanna, opposite Havre de Grace, as mentioned in the same agreement; and that all the work which was done by said plaintiffs on that part of said section No. 9 was commenced, prosecuted, and done under and in virtue of the said agreement in this plea above recited, and not otherwise, nor under any other or different agreement. By reason of which said premises, the said supposed contract in the said first count mentioned became merged, extinguished, waived, released, and abandoned, and this the said defendant is ready to verify; wherefore, &c.

9th. And the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, for a further plea in this behalf as to the said third count of the said declaration, says, that the said plaintiffs their aforesaid action thereof against this defendant to have or maintain ought not, because this defendant says, that after the making of

the said supposed contract in the said third count mentioned, and before the commencement of this suit, to wit, on the twelfth day of July, in the year of our Lord eighteen hundred and thirty-six, a certain agreement by deed in writing was then and there made and entered into by and between the said plaintiffs and this defendant, and which said last mentioned agreement was of the tenor following, to wit, (here set out at length the agreement of 12th July, 1836.) And the said defendant in fact says, that the said part of section No. 9, in the State of Maryland, of the Wilmington and Susquehanna railroad which extends from station No. 191 to the end of the piers and wharf in the river Susquehanna, opposite Havre de Grace, as mentioned in the said last mentioned agreement, is a part of that part of the said railroad between Charlestown and Havre de Grace in said first count mentioned, and which is thereby alleged to have been included in the said supposed contract in said count mentioned, and not another or different part; of which premises the said plaintiffs and this defendant, before and at the time of the making of the said agreement in this plea recited had notice, to wit, at the county aforesaid; and the said defendant in fact says, that after the making of the said agreement in this plea above recited, the said plaintiffs, under and in virtue of the said agreement in this plea above recited, commenced and prosecuted the work on that part of section No. 9, in the State of Maryland, of the Wilmington and Susquehanna railroad, which extends from station No. 191 to the end of the piers and wharf in the river Susquehanna, opposite Havre de Grace, as mentioned in the same agreement; and that all the work which was done by said plaintiffs on that part of said section No. 9 was commenced, prosecuted, and done under and in virtue of said agreement in this plea above recited, and not otherwise, nor under any other or different agreement. By reason of which said premises the said supposed contract in the said third count mentioned, became merged, waived, extinguished, released, and abandoned; and this the said defendant is ready to verify; wherefore, &c.

J. C. GROOME,
Att'y for defendant.

Rule replication.

And thereupon the said Wilmington and Susquehanna Railroad Company, by its attorneys aforesaid, prays that the said Sebre and Hiram Howard may reply to the answer of the said Wilmington and Susquehanna Railroad Company in the plea aforesaid.

Whereupon, it is ruled by the court here, that the said Sebre and Hiram Howard reply to the answer of the said Wilmington and Susquehanna Railroad Company in the plea aforesaid, and if they do not reply to the said answer of the said Wilmington and Susquehanna Railroad Company, judgment will be rendered against them by default.

And the said Sebre and Hiram Howard, by their said attorneys, pray leave of the court here to imparle until the third Monday of October next, to reply to the answer of the said Wilmington and Susquehanna

Railroad Company in the plea aforesaid, and they have it; the same day is given to the said Wilmington and Susquehanna Railroad Company, then, &c.

At which said third Monday of October, (being the eighteenth day of the same month,) in the year 1841, until which day the said Sebre and Hiram Howard had leave to imparle, and then to reply to the answer of the said Wilmington and Susquehanna Railroad Company in the plea aforesaid, comes as well the said Sebre and Hiram Howard, as the said Wilmington and Susquehanna Railroad Company, by their attorneys aforesaid.

Issue to the 1st plea.

And the said Sebre and Hiram Howard, as to the plea of the said Wilmington and Susquehanna Railroad Company, by them first above pleaded, and whereof they have put themselves upon the country, doth the like.

Issue to the 2d plea.

And the said Sebre and Hiram Howard, as to the said plea of the said Wilmington and Susquehanna Railroad Company by them secondly above pleaded, and whereof they have put themselves upon the country, doth the like.

Demurrer to the 2d, 3d, 4th, 5th, 6th, 7th, 8th, and 9th pleas.

And the said Sebre and Hiram Howard, as to the said pleas of the said Wilmington and Susquehanna Railroad Company by them thirdly, fourthly, fifthly, sixthly, seventhly, eighthly, and ninthly pleaded, say, that the same, and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them, the said Sebre and Hiram Howard, from having or maintaining their aforesaid action thereof against them, the said Wilmington and Susquehanna Railroad Company, and that they, the said Sebre and Hiram Howard, are not bound by the law of the land to answer the same; and this they, the said Sebre and Hiram Howard, are ready to verify; wherefore, for want of sufficient pleas in this behalf they, the said Sebre and Hiram Howard, pray judgment and their damages by reason of the not performing of the said several premises and undertakings in the said declaration mentioned, to be adjudged to them, &c.

Joinder in demurrer.

And the said Wilmington and Susquehanna Railroad Company says, that their said pleas by them thirdly, fourthly, fifthly, sixthly, seventhly, eighthly, and ninthly above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said Sebre and Hiram Howard

from having or maintaining their aforesaid action thereof against them, the said Wilmington and Susquehanna Railroad Company, and that they, the said Wilmington and Susquehanna Railroad Company, are ready to verify and prove the same when, where, and in such manner as the said court here shall direct and award; wherefore, inasmuch as the said Sebre and Hiram Howard have not answered the said pleas, nor hitherto in any manner denied the same, the said Wilmington and Susquehanna Railroad Company pray judgment, and that the said Sebre and Hiram Howard be barred from having or maintaining their aforesaid action thereof against them, the said Wilmington and Susquehanna Railroad Company, &c.

Judgment on the demurrer for the defendant.

Whereupon, all and singular the premises being seen, and by the court here fully understood, it appears to the court here that the said pleas by the said Wilmington and Susquehanna Railroad Company in form aforesaid pleaded, and the matter in the same, are good and sufficient in law to preclude the same Sebre and Hiram Howard from having and maintaining their action aforesaid against the said Wilmington and Susquehanna Railroad Company; therefore, it is considered by the court here, that the said Wilmington and Susquehanna Railroad Company recover against the said Sebre and Hiram Howard the sum of one hundred and forty-four dollars and seventy-five cents for their costs and charges by them about their defence in this behalf sustained, to the said Wilmington and Susquehanna Railroad Company by the court here adjudged according to the form of the statute in such case made and provided; and that the said Wilmington and Susquehanna Railroad Company have thereof their execution, &c.

Memorandum.

Judgment was entered in this cause on the 22d day of October, 1841, for defendant upon demurrers.

Test: GEORGE McCULLOUGH, *Clk.*

And thereupon the aforesaid Sebre and Hiram Howard, by their attorneys aforesaid, pray an appeal from the judgment aforesaid so as aforesaid rendered to the high court of appeals, and the same is granted them. It is therefore ordered by the court here, that the record and proceedings in the plea aforesaid, with all things thereunto relating, be transmitted to the high court of appeals, and the same are transmitted accordingly.

Test: GEORGE McCULLOUGH, *Clk.*

MARYLAND, *Cecil county, sct.*

I hereby certify, that the within is a true copy taken and made from the record of proceedings of the county court of Cecil county.

In testimony whereof I hereto set my hand, and the seal of Cecil county court affix, this sixteenth day of November, anno domini 1849.

[SEAL.]

R. C. HOLLYDAY, *Clk.*

To the admission in evidence of which said deposition in the cause the defendant, by its counsel, objected; but the court overruled said objection, and permitted the same to be read in evidence to the jury in this cause; to the admission of which said evidence the defendant, by its counsel, prayed leave to except; and prayed that the court here would sign and seal this its sixth bill of exceptions, and which is accordingly done this 14th day of November, 1850.

R. B. TANEY, [SEAL.]
U. S. HEATH. [SEAL.]

Defendants' seventh bill of exceptions.

SEBRE HOWARD
vs.
The PHILADELPHIA, Wilmington, and Baltimore Railroad Company.

7th bill of exceptions.

The [defendant] *plaintiff* further proved by George F. De la Roche, that he never found any fault with plaintiff or his work; and that on the 18th day of January, 1837, in the evening of that day, witness was discharged from the service of the company, as were all the other engineers in the service of the company, (with the exception of the chief engineer and one assistant,) and all the hands and laborers employed on the line of the road; and that Stabler, the chief engineer, was sick, and not upon the road in the month of January, 1837.

And afterwards, in the argument of the case before the jury, the counsel for the defendant referred to and commented upon the depositions of John McMurray and R. P. Dowden, in said record contained. After the testimony was closed, the plaintiff offered the following prayers:

Plaintiff's prayers.

1st. If the jury believe that Sebre Howard made with the defendants the contract in question, and went on to perform the work under the same, and so continued the same until the month of January, 1837, when the company declared his contract forfeited, and that the engineers of the company made an estimate of the work so done, showing a balance due the contractor, Howard, of , then plaintiff is entitled to recover that sum with interest.

2d. If the jury believe the facts stated in the foregoing prayer, and further find that the plaintiff was stopped by the officers of the defendant from proceeding in their work, which stoppage was induced by the injunction issued and given in evidence; and if they further find that the defendant had neglected to procure any title to the land worked upon until after such injunction was laid and dissolved, then the plaintiff is entitled to recover such amount of damages as the jury may find from the evidence that he sustained by reason of his being turned off from said work.

3d. If the jury find the facts stated in the preceding prayers, then by the true construction of the contract the plaintiffs are entitled to the excess of overhaul, resulting from going off the company's lands, and descending to and ascending from Mill creek, in the construction of the embankment east of Mill creek.

4th. If the jury find all the facts stated in the preceding prayers, and further find that the plaintiffs were obstructed in the performance of their work by the absence of proper cribs at the river Susquehanna, where plaintiff was at work at the time; and if they further find that he was in consequence of such non-performance by defendants turned away from this work, then plaintiffs are entitled to recover such amount as the jury may find he sustained damage by reason of such omission of defendant.

5th. That by the true construction of the contract in this case the defendants were bound to furnish ground to waste the earth upon which was to be dug out of the hills through which the road was to be cut by plaintiff; and if they find that the defendants refused to do so, plaintiff is entitled to recover such sum as the jury may find he sustained loss by not being furnished with ground to waste such earth upon.

6th. That plaintiff is entitled to recover for any and every overhaul exceeding an average of 800 feet.

7th. That if the jury find that the plaintiff faithfully performed his work under this contract, and was only prevented from finishing it by the misconduct of the defendant, then plaintiff is entitled to recover such sum as he would have made by completing said contract.

8th. If the jury believe that the defendant wilfully and fraudulently, and without any reasonable or probable cause, declared the contract given in evidence forfeited, then the plaintiffs are entitled to recover, notwithstanding such declaration of forfeiture, for any damages arising to them, after such declaration of forfeiture, in consequence thereof.

9th. That by the true construction of the contract given in evidence it was the duty of the defendant to have all the culverts and bridges upon the route of said road, within the limits of plaintiff's contract, prepared for the free pursuance of his work; and if the jury believe that defendants or persons employed by them neglected so to do, they, defendants, are liable for such damages as plaintiffs shew they sustained in consequence of such omission or neglect of defendant.

10th. That by the true construction of this contract it was the duty of defendants to prevent or remove all obstructions to the plaintiff's work which it was within their power to remove; and it was their duty to have obtained a right to work on the road before said plaintiffs commenced their work; and if they find that, in consequence of legal proceedings against said company, plaintiffs were obstructed and hindered in the performance of their work, and thereby seriously damaged, that plaintiffs are entitled to recover for such damage.

11th. That plaintiffs are entitled to recover for all work and labor actually done and performed under said contract, including the 15 per

cent. retained upon the several estimates, after deducting the payments shown to have been made.

And the defendant offered the following:

Defendant's prayers.

1st. The defendant, by its counsel, prays the court to instruct the jury that if they shall find, from the evidence in this cause, that the seal upon the contract, offered in evidence by the plaintiff, dated 12th July, 1836, was not affixed to the said contract by the authority of the Wilmington and Susquehanna Railroad Company, and was affixed without the authority of the defendant in this suit, and was so affixed after the execution of the agreement of union, offered in evidence by the plaintiffs, dated the 5th of February, 1838, the plaintiff is not entitled to recover upon it in this suit.

2d. If the jury shall find, from the evidence in this cause, that at the trial in Cecil county court in December, 1847, of the case of Sebre Howard and Hiram Howard against the Wilmington and Susquehanna Railroad Company, spoken of in their testimony by Mr. Hollyday, Mr. Ellis, Mr. Stump, and Mr. Scott, the plaintiffs in said suit offered in evidence to the jury, in support of the issue joined on their part, the contract offered in evidence in this cause, marked exhibit B, and shall further find, from the evidence in the cause, that the defendant in said suit offered no evidence whatever in support of the issue joined on its part, and that the counsel for the defendant in that suit, when the plaintiffs offered to read in evidence the contract, marked B, objected to the admissibility of the same in evidence upon the issue joined in said suit, upon the ground that whereas the plaintiffs in that suit declared on an alleged contract made by the said plaintiffs with the said defendant in that suit, yet the said paper, so offered to be read in evidence by the said plaintiffs, being executed only by said Sebre Howard, and under his seal, was the contract alone of said Sebre Howard, and was not the same contract alleged by the plaintiffs in the pleadings in that case; and shall further find, from the evidence in the cause, that this was the only objection made and argued in the trial of said cause on the part of the defendant, and was the only point then and there decided by the said court, then the reliance on said objection does not estop or debar the defendant in this suit from denying that the paper, marked exhibit A, now offered in evidence in this suit by the plaintiff, is not the deed of the Wilmington and Susquehanna Railroad Company, even if the jury shall find, from the evidence in the cause, that the said paper A was then and there in court, in the possession of the defendant's counsel in that suit, and was spoken of by him, as stated by the witnesses, as the real contract between the parties; provided, they shall also find, from the evidence in the cause, that the counsel who appeared for the defendant in said suit were then wholly ignorant of the fact that said seal had been placed on the said contract, without any authority, as aforesaid.

3d. If the jury shall find, from the evidence in the cause, that the work done on the 9th section of the Wilmington and Susquehanna railroad on and after the 12th day of July, 1836, so far as done by the plaintiff, Sebre Howard, was so done by said plaintiff as one of the firm of Sebre and Hiram Howard, and that all the estimates were made out as in favor of said firm, and received and receipted for by the plaintiffs, so far as any moneys were received by him from the said company in the name and on behalf of said firm; and that the plaintiff, in his dealings and transactions with said company, professed to act as one of said firm, and for and on behalf of said firm, and never notified the said company, or any of its officers, whilst engaged in work on said road, that he was not acting as a member of said firm, and for and on behalf of said firm, then the plaintiff is not entitled to recover in this case upon the first breach by him assigned in his declaration.

4th. If the jury shall find from the evidence in the cause, that the resolution of the board of the Wilmington and Susquehanna Railroad Company, dated 18th January, 1837, offered in evidence in this cause, was duly passed by said board, and shall not find from the evidence in the cause that the same was fraudulently passed by said board, or by said company, then the plaintiff is not entitled to recover on the 7th breach of his declaration.

5th. If the jury shall find with the defendant on the 4th prayer, and shall also find, from the evidence in the cause, that notice was given on the same day, to the plaintiff in the suit, of the passage of said resolution, then the said contract was thereby rendered null so far as concerned any liability thereunder on the part of the defendant; and that the plaintiff is not entitled to maintain this suit.

6th. If the jury shall find, from the evidence in the cause, that the first mile of said section No. 9 was not finished on or before the 15th day of October, 1836, and was not, in fact, finished at any time, nor accepted by the defendant as fully and completely graded by the plaintiff, or by the said firm of Sebre Howard and Hiram Howard; and shall further find, from the evidence, that the alleged excuses, alleged in pleading by the plaintiff, were not in any respect the cause of, or contributory to the failure on the part of the said plaintiff, or of the said plaintiff and said Hiram Howard, to finish the same in the time limited for that purpose in said contract, then the plaintiff is not entitled to recover in this case on said first breach in his said declaration.

7th. If the jury shall find, from the evidence, that the injunction issued by John Stump, offered in evidence in this cause, was issued without any justifiable cause, and without any basis in right, and that the issuing of said injunction was not based on any actual omission of duty on the part of the said company, then the plaintiff is not entitled to recover on the second count of his declaration.

8th. If the jury shall find, from the evidence in the cause, that the plaintiff was contractor on another section of the road of the said company, and that said former section was completed by him before the making of the contract offered in evidence in this case; and shall fur-

ther find, that in the execution of said former contract the plaintiff provided bridges and other modes of intercommunication from one part of his work to another, without any complaint; and shall further find that it was the known usage of said company to leave to the contractors the business of construction of their bridges, so as to pass with materials and excavation from one part of their work to another, and that such is the known and uniform usage of other public works, then the plaintiff is not entitled to recover on the second breach of his declaration.

9th. If the jury shall find, from the evidence in the cause, that the plaintiff, at the time he was stopt by the assistant engineer, Mr. Farquhar from throwing more earth against the outer crib of the embankment at the river, might readily and conveniently have deposited many thousand cubic yards of earth within the limits of the said embankment, if he had chosen so to do; and that the plaintiff perversely and stubbornly refused so to do; then the plaintiff is not entitled to recover on the 4th breach of his declaration.

10th. If the jury shall find, from the evidence, that the excavations made by the plaintiff, in the month of December, 1836, was needed by the defendant for the embankment at the river; and shall also find that the same could have been conveniently deposited there by the plaintiff, and that the plaintiff knew these facts, then the plaintiff is not entitled to recover on the 5th breach of his declaration.

11th. If the jury shall find that fair and proper estimates were made by defendant for all the overhaul of earth made by the plaintiff, over the average haul of 800 feet, then the plaintiff is not entitled to recover on the 6th breach of his declaration.

12th. If the jury shall believe that, at the time of the execution of the agreement, the road to be excavated and graded was staked out and marked upon the ground, and that a profile was shown, showing the depth of excavation to be made, and the height of the embankments, and that afterwards the plan of the road was altered and changed, by which the excavations were to be deeper and wider, and some of the embankments higher and some lower, to suit the altered plan of the road, and that the work done by the plaintiff, and for which he claims damages, was in grading the road according to the altered plan, then the plaintiff is not entitled to recover in this action.

13th. If the jury shall believe that all the work done in pursuance of the agreement stated in the declaration was done by Sebre and Hiram Howard, and not by Sebre Howard alone, that then the plaintiff is not entitled to recover.

The court thereupon rejecting the respective prayers on both sides, gave the jury the following instructions:

Court's instructions to the jury.—Court's instructions to the jury.

SEBRE HOWARD
vs.
THE PHILADELPHIA, Wilmington, and Baltimore Railroad Company.

1st. If the corporate seal of the Wilmington and Susquehanna Rail-

3d. If the jury shall find, from the evidence in the cause, that the work done on the 9th section of the Wilmington and Susquehanna railroad on and after the 12th day of July, 1836, so far as done by the plaintiff, Sebre Howard, was so done by said plaintiff as one of the firm of Sebre and Hiram Howard, and that all the estimates were made out as in favor of said firm, and received and receipted for by the plaintiffs, so far as any moneys were received by him from the said company in the name and on behalf of said firm; and that the plaintiff, in his dealings and transactions with said company, professed to act as one of said firm, and for and on behalf of said firm, and never notified the said company, or any of its officers, whilst engaged in work on said road, that he was not acting as a member of said firm, and for and on behalf of said firm, then the plaintiff is not entitled to recover in this case upon the first breach by him assigned in his declaration.

4th. If the jury shall find from the evidence in the cause, that the resolution of the board of the Wilmington and Susquehanna Railroad Company, dated 18th January, 1837, offered in evidence in this cause, was duly passed by said board, and shall not find from the evidence in the cause that the same was fraudulently passed by said board, or by said company, then the plaintiff is not entitled to recover on the 7th breach of his declaration.

5th. If the jury shall find with the defendant on the 4th prayer, and shall also find, from the evidence in the cause, that notice was given on the same day, to the plaintiff in the suit, of the passage of said resolution, then the said contract was thereby rendered null so far as concerned any liability thereunder on the part of the defendant; and that the plaintiff is not entitled to maintain this suit.

6th. If the jury shall find, from the evidence in the cause, that the first mile of said section No. 9 was not finished on or before the 15th day of October, 1836, and was not, in fact, finished at any time, nor accepted by the defendant as fully and completely graded by the plaintiff, or by the said firm of Sebre Howard and Hiram Howard; and shall further find, from the evidence, that the alleged excuses, alleged in pleading by the plaintiff, were not in any respect the cause of, or contributory to the failure on the part of the said plaintiff, or of the said plaintiff and said Hiram Howard, to finish the same in the time limited for that purpose in said contract, then the plaintiff is not entitled to recover in this case on said first breach in his said declaration.

7th. If the jury shall find, from the evidence, that the injunction issued by John Stump, offered in evidence in this cause, was issued without any justifiable cause, and without any basis in right, and that the issuing of said injunction was not based on any actual omission of duty on the part of the said company, then the plaintiff is not entitled to recover on the second count of his declaration.

8th. If the jury shall find, from the evidence in the cause, that the plaintiff was contractor on another section of the road of the said company, and that said former section was completed by him before the making of the contract offered in evidence in this case; and shall fur-

ther find, that in the execution of said former contract the plaintiff provided bridges and other modes of intercommunication from one part of his work to another, without any complaint; and shall further find that it was the known usage of said company to leave to the contractors the business of construction of their bridges, so as to pass with materials and excavation from one part of their work to another, and that such is the known and uniform usage of other public works, then the plaintiff is not entitled to recover on the second breach of his declaration.

9th. If the jury shall find, from the evidence in the cause, that the plaintiff, at the time he was stopt by the assistant engineer, Mr. Farquhar from throwing more earth against the outer crib of the embankment at the river, might readily and conveniently have deposited many thousand cubic yards of earth within the limits of the said embankment, if he had chosen so to do; and that the plaintiff perversely and stubbornly refused so to do; then the plaintiff is not entitled to recover on the 4th breach of his declaration.

10th. If the jury shall find, from the evidence, that the excavations made by the plaintiff, in the month of December, 1836, was needed by the defendant for the embankment at the river; and shall also find that the same could have been conveniently deposited there by the plaintiff, and that the plaintiff knew these facts, then the plaintiff is not entitled to recover on the 5th breach of his declaration.

11th. If the jury shall find that fair and proper estimates were made by defendant for all the overhaul of earth made by the plaintiff, over the average haul of 800 feet, then the plaintiff is not entitled to recover on the 6th breach of his declaration.

12th. If the jury shall believe that, at the time of the execution of the agreement, the road to be excavated and graded was staked out and marked upon the ground, and that a profile was shown, showing the depth of excavation to be made, and the height of the embankments, and that afterwards the plan of the road was altered and changed, by which the excavations were to be deeper and wider, and some of the embankments higher and some lower, to suit the altered plan of the road, and that the work done by the plaintiff, and for which he claims damages, was in grading the road according to the altered plan, then the plaintiff is not entitled to recover in this action.

13th. If the jury shall believe that all the work done in pursuance of the agreement stated in the declaration was done by Sebre and Hiram Howard, and not by Sebre Howard alone, that then the plaintiff is not entitled to recover.

The court thereupon rejecting the respective prayers on both sides, gave the jury the following instructions:

Court's instructions to the jury.—Court's instructions to the jury.

SEBRE HOWARD
vs.
THE PHILADELPHIA, Wilmington, and Baltimore Railroad Company.

1st. If the corporate seal of the Wilmington and Susquehanna Rail-

road Company was affixed to the instrument of writing upon which this suit is brought, with the authority of the company, while it had a separate existence for the purpose of making it at that time, and as it then stood the contract of the company, then the said instrument of writing is the deed of the said corporation, although it was never delivered to the plaintiff nor notice of the sealing given to him; and although no seal was affixed by the corporation to the duplicate copy delivered to him; and the defendant in the present action is equally bound by it, and in like manner.

2d. If the jury find from the evidence that this instrument of writing was produced in court, and relied upon by the present defendant, as a contract under the seal of the Wilmington and Susquehanna Railroad Company, in an action of assumpsit brought by Sebre and Hiram Howard against the last mention[ed] company in Cecil county court; and that the said suit was decided against the plaintiffs upon the ground that this instrument was duly sealed by the said corporation as its deed, then the defendant cannot be permitted in this case to deny the validity of the said sealing, because such a defence would impute to the present defendant itself a fraud upon the administration of justice in Cecil county court.

3d. If upon either of these grounds the jury find the instrument of writing upon which this suit is brought to be the deed of defendant, then the plaintiff is entitled to recover in this suit any damage he may have sustained by a breach of the covenants on the part of the corporation; but if they find that it is not the deed of the defendant upon either of these grounds, then their verdict must be for the defendant.

4th. The omission of the plaintiffs to finish the work within the times mentioned in the contract, is not a bar to his recovery for the price of the work he actually performed; but the defendant may set off any damage he sustained by the delay, if the delay arose from the default of the plaintiffs.

5th. If the defendant annulled this contract, as stated in the testimony, under the belief that the plaintiff was not prosecuting the work with proper diligence, and for the reasons assigned in the resolution of the board, they are not liable for any damage the plaintiff may have sustained thereby, even although he was in no default, and the company acted in this respect under a mistaken opinion as to his conduct.

6th. But this annulling did not deprive him of any rights vested in him at that time, nor make the covenant void ab initio, so as to deprive him of a remedy upon it for any money then due him for his work, or any damages he had then already sustained.

7th. The increased work occasioned by changing the width of the road and altering the grade having been directed by the engineer of the company under its authority, was done under this covenant, and within its stipulations, and may be recovered in this action, without resorting to an action of assumpsit.

8th. If the jury find for the plaintiff upon the first or second instructions, he is entitled to recover the amount due on the work done by

him in December, 1836, and January, 1837, according to the measurements and valuation of the engineer of the company, and cannot go into evidence to shew that they were erroneous, or that he was entitled to a greater allowance for overhaul than the amount stated in the estimates of the engineer.

9th. Also, if from any cause, without the fault of the plaintiff, the earth excavated could not be used in the filling up and embankments on the road and at the river, it was the duty of the defendant to furnish a place to waste it. And if the company refused, on the application of the plaintiff to provide a convenient place for that purpose, he is entitled to recover such damages as he sustained by the refusal, if he sustained any; and he is also entitled to recover any damage he may have sustained by the delay of his work or the increase of his expense in performing it, occasioned [by] the negligence, acts, or default of the defendant.

10th. Also, the plaintiff is entitled to recover the fifteen per cent. retained by the company, unless the jury find that the company has sustained damage by the default, negligence, or misconduct of the plaintiff. And if such damage has been sustained, but not to the amount of the fifteen per cent., then the plaintiff is entitled to recover the balance, after deducting the amount of damage sustained by the company.

11th. The corporation was not bound to provide bridges over the streams to enable the plaintiff to pass conveniently with his carts from one part of the road to another.

12th. The decision of the court of appeals is conclusive evidence that the injunction spoken of in the testimony, was not occasioned by the default of the defendant; and the plaintiff is not entitled to recover damages for the delay occasioned by it, unless the jury find that the company did not use reasonable diligence to obtain a dissolution of the injunction.

13th. If the jury find that the resolution of the company annulling the contract was not in truth passed for the reasons therein assigned, but for the purpose of having the remaining work done upon cheaper terms than those agreed upon in the contract with the plaintiff, or for the purpose of oppressing and injuring the plaintiff, then he is entitled to recover damages for any loss of profit he may have sustained by the refusal of the company to permit him to finish the work he had contracted to perform, if he sustained any.

The defendant, by its counsel, prayed leave to except in respect of all and each of the prayers offered on the part of the defendant to the court's refusal to grant said several prayers respectively, and also prayed leave to except to the instructions given by the court to the jury, and to each one of said instructions, severally and respectively, and prayed that the court here would sign and seal this its seventh bill of exceptions, according to the form of the statutes in such case made and provided; and which is accordingly done this 16th day of November, 1850.

R. B. TANEY, [SEAL.]
U. S. HEATH. [SEAL.]

And now here, at this day, to wit, the twenty-first day of November, in the year of our Lord one thousand eight hundred and fifty, the said Philadelphia, Wilmington, and Baltimore Railroad Company produced to the said circuit court here the writ of the said United States of America, for the correcting of errors of and upon the premises, commanding the record and proceedings aforesaid, of the judgment aforesaid, so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington, on the first Monday in December next; which said writ of error is in the words and of the tenor following, to wit:

THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

The President of the United States, to the judges of the circuit court of the United States, for the fourth circuit court, in and for the Maryland district, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before [SEAL.] you, or some of you, in which Sebre Howard is plaintiff, and the Philadelphia, Wilmington, and Baltimore Railroad Company is defendant, a manifest error hath happened, to the great damage of the said Philadelphia, Wilmington, and Baltimore Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first Monday in December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable R. B. Taney, chief justice of our Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and forty-nine. THO. SPICER,

W. S. Issued 21 November, 1850. *Clerk circuit court.*

In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court accordingly.

Writ of error bond.

Know all men by these presents, that we, the Philadelphia, Wilmington, and Baltimore Railroad Company, and Samuel McDonald and Thomas Kelso, of the city of Baltimore and State of Maryland, are held and firmly bound unto Sebre Howard in the just and full

sum of fifty thousand dollars, lawful money of the United States, to be paid to the said Sebre Howard, his executors, administrators, or assigns; to which payment, well and truly to be made and done, we hereby bind ourselves, and our heirs, executors and administrators, jointly and severally, firmly by these presents; the same being signed on the part of said company by William H. Swift, president of said company, and sealed with its corporate seal, by direction and authority of said company, and being signed and sealed by the other parties respectively, and dated this twenty-ninth day of November, in the year of our Lord eighteen hundred and fifty.

Whereas, at a circuit court of the United States, for the fourth circuit, in and for the Maryland district, begun and held at the city of Baltimore, on the first Monday in November, in the year of our Lord one thousand eight hundred and fifty, the said Sebre Howard, by the judgment of the same court, recovered against the Philadelphia, Wilmington, and Baltimore Railroad Company aforesaid, as well the sum of twenty-four thousand four hundred and twenty-five dollars and twenty-four cents, lawful money of the United States, for his damages by him sustained, by reason of certain breaches of the covenant between the said Sebre Howard and the Wilmington and Susquehanna Railroad Company made, and upon the said covenant of which said last mentioned company the said Philadelphia, Wilmington, and Baltimore Railroad Company was, in this behalf, impleaded; as the sum of four hundred dollars for his costs and charges by him about his suit in that behalf laid out and expended. And whereas, also, the Philadelphia, Wilmington, and Baltimore Railroad Company aforesaid is about to sue forth a certain writ of the United States of America, for the correcting of errors of and upon the said judgment, so as aforesaid returnable to the Supreme Court of the United States, to be held at the city of Washington on the first Monday in December next:

Now, the condition of the above obligation is such, that if the said Philadelphia, Wilmington, and Baltimore Railroad Company shall not prosecute the said writ of error with effect, and also satisfy and pay unto the said Sebre Howard, his executors, administrators, or assigns, in case said judgment shall be affirmed, as well all and singular the damages, costs, and charges aforesaid, adjudged by the said circuit court, as also all costs and damages that shall be awarded by the said Supreme Court, then this bond to be and remain in full force and virtue; otherwise of no effect.

W. H. SWIFT, [SEAL.]
President of the P., W., and Balt. R. R. Co.
SAML. McDONALD, [SEAL.]
THO. KELSO. [SEAL.]

The above obligation was signed by William H. Swift, president, and sealed with the corporate seal by authority of the board of directors of the Philadelphia, Wilmington, and Baltimore Railroad Company, in presence of—

A. CAMBELL,
Secretary of said P. W. & B. R. R. Comp'y.